NUCLEAR ENERGY INSTITUTE

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TECHNICAL/REGULATORY

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Mr. David Meyer, Chief
Rules Review and Directives Branch
Division of Freedom of Information
and Publication Services
Office of Administration - Mail Stop T6D59
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Mr. Meyer:

In my letter of October 24, 1994, I noted that NEI would provide a separate document supplementing that letter and providing detailed comments in response to the questions posed in the August 23, 1994, *Federal Register* notice. That document is enclosed with this letter.

We believe that the information included in the enclosure provides additional support for the industry's belief that certain modifications to the enforcement program are required to reflect the industry's safety performance and record of compliance, and to closely adhere to the NRC's statutory mission and its Principles of Good Regulation. We would be pleased to meet with the NRC staff to discuss any of these matters further.

Sincerely,

William H. Rasin

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Comments on the Nuclear Energy Institute
Reexamination of the NRC's Enforcement Policy

A. PURPOSE AND OBJECTIVES OF THE NRC ENFORCEMENT PROGRAM

1. Is the purpose of the enforcement program stated above the proper area of focus for the NRC enforcement program? If not, why not and what should the purpose be?

The purpose of the enforcement policy as currently stated is consistent with NRC's statutory mandate of protecting the public health and safety. This purpose should not be changed. We believe, however, that a disciplined approach has not been imposed on the implementation of the enforcement program. Instead, the number and varying interpretations of NRC regulations have made technical violations increasingly difficult for licensees to avoid, even though the vast majority of them have little or no safety implications. Imposition of enforcement action for non-safety significant violations dilutes the attention that licensees and NRC can direct to matters relating to public health and safety. Certainly, that outcome is neither consistent with the purpose of the enforcement program nor the agency's statutory mandate.

2. Are the four objectives of the NRC enforcement program stated above (i.e., ensuring compliance, obtaining corrective action, deterring future violations, and encouraging improved performance of other licensees and vendors) appropriate? If not, why not and what should the objectives be?

Three of the four objectives are consistent with the purpose of the enforcement policy. The portion of fourth, "encouraging improvement of licensee and vendor performance . . ." is inappropriate for the enforcement program and should be eliminated. Currently, the enforcement program or the threat of its use is used to "encourage" licensees to make "improvements" in various programs or management. For example, enforcement correspondence is vague or general and does not cite any rule requiring the recommended improvement or standard by which the recommended improvement can be measured. The transmittal letter for a Notice of Violation (NOV), has no legal or regulatory status. Yet licensees feel pressure to adopt NRC suggested "improvements" because they believe that in essence, they have no choice but to do so. The industry recommends, therefore, that if a transmittal letter for an NOV is necessary, it should be confined to facts relevant to receipt of and response to the NOV.

It is inappropriate to use the enforcement program to encourage licensees to modify their programs and management in ways not prescribed by the regulations. Such encouragement constitutes an attempt to continually amend the regulatory standards applicable to licensees. If the NRC desires to raise its regulatory standards, it should do

so formally and generically by modifying its rules and regulatory guidance in accordance with the Administrative Procedure Act (See Attachment 1, Section B.2 to our letter of October 24, 1994). Therefore, NRC's fourth objective should be modified to focus on compliance with applicable requirements. NEI suggests that the fourth objective be reworded to state as follows:

> Encouraging licensees and vendors to identify, report (if required), and correct potential safety problems.

3. Does the enforcement program as implemented achieve the stated purpose and objectives? Explain why or why not.

In its application, the enforcement program has routinely placed a disproportionate amount of NRC attention and interest on achieving compliance through deterrence. In fact, the deterrent aspect of the enforcement policy does not significantly enhance existing strong motivations for licensees to comply with the regulations. Licensees comply for several independent reasons. Among the primary reasons are that economic forces render poor safety and regulatory performance untenable, and a strongly ingrained ethic of professionalism among licensee personnel makes ensuring plant safety a paramount concern.

The objective evidence indicates that in recent years there has been a positive trend in industry safety performance. This trend, and the fact that the number and safety significance of safety-related events have decreased, demonstrates that there is no need to make the enforcement policy harsher or more punitive.

The industry believes that implementation of the enforcement policy could be improved by providing more positive incentives for good performance. The NRC's Principles of Good Regulation suggest that "good regulation encourages sound and effective practices, discourages unsound practices, and identifies questionable practices." (Emphasis added.) In the case of the NRC's enforcement policy, this should include positive incentives for good practices such as prompt identification, reporting (if required), and correction of potential problems. If a licensee acts responsibly by identifying, reporting, and correcting violations, NRC should adopt a policy that penalties will not be issued for such violations. In that way, sound and effective practices will be encouraged and a goal of the Principles of Good Regulation achieved.

> **(a) Are enforcement sanctions effective in obtaining comprehensive and lasting corrective action, i.e., does the time and effort spent in developing responses to enforcement actions result in a more thought out approach for corrective action and implementation of that action than would otherwise occur?**

Violations command the attention of licensee management and are routinely the subject of root cause analyses leading to action to correct the deficiencies and prevent their recurrence. Thus, regardless of subject matter or safety significance, licensees are responsive to enforcement actions by implementing comprehensive and lasting corrective action.

However, and as noted above, even in the absence of enforcement sanctions for a specific violation, licensees have other substantial incentives to identify problems and implement effective corrective actions. In fact, licensees are encouraged to correct problems, improve safety, and maintain and exceed regulatory compliance by factors entirely separate from NRC's enforcement sanctions for a particular violation.

First, tremendous economic incentives drive compliance and excellence. The capital investments in a nuclear plant and the costs of replacement power are so large that no licensee can afford to ignore problems that could potentially adversely affect continued safe operation. Therefore, once a problem is identified (whether by the NRC, the licensee, or a third party), a licensee has a substantial economic incentive to correct the problem.

Second, in general, a licensee has a substantial interest in maintaining the NRC's confidence in plant performance. Effective corrective actions are an important factor in achieving these goals. Therefore, even in the absence of an enforcement sanction for a particular violation, a licensee has an incentive to identify problems and take effective corrective action to maintain its overall regulatory standing with NRC.

Third, licensee personnel are motivated by a strong sense of professionalism. They take seriously their responsibility to safely operate their plants and take pride in their overall corporate safety records.

Because of these incentives for corrective action, licensees generally have taken and will continue to take effective corrective action even if there were a total absence of enforcement sanctions. As a result, imposition of enforcement sanctions should be reserved for those cases where the positive incentives have not been effective, i.e., in those cases where a licensee who was or should have been aware of a potential safety problem, did not identify, report (if required), or correct it.

(b) Do some types of sanctions result in more extensive, comprehensive, or lasting corrective action than others?

(i) If so, which types of sanctions are more effective than others, i.e, (a) Notices of Violation at Security Level V, at Severity Level IV with and without a civil penalty, at Severity Level III with and without a

civil penalty, at Severity Level II with and without a civil penalty, and at Severity Level I with and without a civil penalty, and (b) orders?

(ii) If so, why? For example, do some sanctions get more management attention than others, i.e., do all senior licensee officials, such as the Vice President, President, Chief Executive Officer or Board of Directors, get copies of every sanction including non-cited violations, or do senior officials only get copies of certain types of sanctions such as civil penalties or orders, or for that matter do they get copies at any time?

(iii) If not, what changes could be made to improve corrective action?

As discussed above in the response to question A.3(a), violations, regardless of severity level or civil penalty amount, command the attention of senior licensee management. Additionally, a licensee has substantial incentives to take effective corrective actions even in the absence of NRC enforcement action. Therefore, with few exceptions, licensees take extensive, comprehensive, and lasting corrective action without regard to the type of sanction imposed.

As a result, the industry believes that enforcement sanctions should be reserved for those relatively rare cases where a licensee was or should have been aware of a potential safety problem and did not identify, report (if required), or effectively correct it. Issuance of an enforcement sanction, and especially an escalated enforcement action, would send a clear signal that the licensee's corrective actions have not been sufficient. NRC's enforcement policy properly would place more emphasis on the importance of identification and correction of potential problems by providing positive incentives (i.e., taking no enforcement sanction) for effective corrective action, negative incentives (i.e., imposing an enforcement sanction) for ineffective corrective actions, and escalating or mitigating the enforcement action based upon safety significance and the nature of the corrective action (or lack there of).

(c) Has the NRC's past use of sanctions created deterrence, i.e., does the threat of sanctions contribute to the desire to maintain compliance?

(i) If not, what changes could be made to provide more deterrence?

(ii) Commenters are requested to address the deterrence value of each type of sanctions: (a) Notice of Violation at Severity Level V, at Severity Level IV with and without a civil penalty, at Severity Level III with and without a civil penalty, at Severity Level II with and without a

civil penalty, and at Severity Level I with and without a civil penalty, and (b) orders.

Because enforcement sanctions command the attention of a licensee's management, to preserve the deterrence value, the NRC should use enforcement sanctions judiciously. Enforcement sanctions should be reserved for those relatively rare cases where other motivating factors previously discussed (e.g., economic incentives, potential to adversely affect NRC's perception of a licensee's performance, and work force commitment to safe operation) have not been sufficient or are not likely to be sufficient to deter violations. Enforcement sanctions may be generally appropriate for cases involving intentional violations or other wrong-doing by licensees or where a licensee has not acted to correct the problem. The deterrent effect of enforcement sanctions which are applied to violations that have little or no safety significance, does not justify diverting the attention of licensee management toward such violations and away from matters that are important to safety. Further, if the NRC were to indiscriminately issue enforcement sanctions or civil penalties for all or most violations, the deterrent effect of NRC enforcement actions would be diminished because licensee management would no longer be given clear indications by NRC regarding which violations truly warrant additional licensee attention and resources.

(iii) To what extent does the issuance of press releases contribute to the deterrence?

(iv) Should press releases be issued for Notices of Violation, Confirmatory Action Letters, Demands for Information, as well as civil penalties and orders? If not, why not?

The issuance of a press release prior to a determination that enforcement action is necessary or to mark each of the multiple steps of the enforcement process for enforcement actions has several negative impacts. Under such circumstances, press releases damage the licensee's reputation and good will and provide the public with a negative impression of nuclear power. While licensees obviously desire to avoid such impacts, press releases do not serve independently to deter licensee noncompliance and generally have no effect upon the nature or quality of licensee corrective action. As above noted, licensees' desire to ensure safe operation and avoid economic liability are stronger deterrents than enforcement action and the numerous press releases typically attendant to that process.

The NRC should not use press releases as a method to increase the deterrent value of enforcement sanctions for the following reasons. First, the purpose of press releases should be to inform the public of matters of significance, not to punish a licensee. Second, the negative impacts of press releases often far exceed any incremental

improvements in performance achieved through deterrence. In this regard, press releases should not be used for routine enforcement actions such as notices of violations not involving a civil penalty. Neither should they be used for Confirmatory Action Letters or Demands for Information which the enforcement policy classifies as "Administrative Actions" rather than "Enforcement Actions". In such cases, the negative impacts of the press releases are likely to far outweigh any deterrent value. Third, because the NRC seldom issues press releases regarding a licensee's good performance, use of NRC press releases for enforcement actions tends to provide the public with an unbalanced picture of a licensee's performance.

Finally, the NRC should not issue press releases for enforcement conferences and proposed civil penalties because agency action is not yet final and a licensee unfairly incurs the negative impacts of such press releases in cases where the enforcement conferences do not result in a civil penalty or where the proposed civil penalty is mitigated. Press releases should only be issued to inform the public of those cases involving escalated enforcement action that has become final.

(d) Do NRC sanctions against particular licensees result in improving the general performance of the regulated industry by encouraging other licensees to take actions to prevent or identify and correct similar violations at their facilities after learning of the violations and sanctions imposed on other licensees?

(i) Licensee commenters should address whether they are normally aware of enforcement actions issued against other licensees at the level of (1) non-escalated Notices of Violations, (2) escalated Notices of Violations without civil penalties, (3) civil penalties, and (4) orders.

(ii) If commenters are aware of enforcement actions issued against other licensees, how do they become aware of them (e.g., NUREG 0940, "Enforcement Actions: Significant Actions Resolved," NRC Information Notices, NMSS Newsletters, press releases, law firm newsletters, industry newsletters, Federal Register, or other sources)? Should NRC consider betters ways to provide licensees and vendors with information about NRC enforcement actions such as use of an electronic bulletin board or an enforcement newsletter?

(iii) If commenters are aware of enforcement actions issued against other licensees, is the information from those actions used to improve performance? How is it used to achieve better performance (e.g., discussed during staff meetings, incorporated into training, or made the subject of required reading)?

Licensees maintain numerous means of disseminating information regarding enforcement actions at other facilities. They include those identified in the NRC's question as well as NRC Weekly Reports, Owners and Regional Groups, NEI, the Institute for Nuclear Power Operations, and normal contacts between utilities and among utilities and their contractors and law firms. Therefore, the industry believes that licensees currently have sufficient sources of information regarding enforcement actions taken against other licensees.

In general, licensees informally disseminate (e.g., in staff meetings and distribution of memos) information regarding enforcement actions at other plants in order to familiarize licensee personnel with problems occurring elsewhere in the industry. Each licensee has its own processes, but they all have the same goal. By alerting licensee personnel to such problems, they are better able to avoid similar problems and to identify and correct such problems if they arise.

As discussed above in response to question A.3, the industry believes that it is an appropriate objective of the enforcement policy to encourage licensees to identify and correct their own compliance problems. The industry does not believe, however, that the NRC resources necessary to provide enforcement information through, for example, an electronic bulletin board or by a newsletter are justified. Moreover, information on standards and performance issues is more effectively provided to licensees through Information Notices and Generic Letters. And, to a large extent, licensees already become aware of enforcement actions at other plants, attempt to identify broadly applicable lessons learned and try to ensure that such a noncompliance is avoided.

4. Agency-wide (i.e., from region to region) consistency and predictability in the nature and type of sanctions have been important considerations in developing enforcement sanctions. As a result, the enforcement policy has become substantially more detailed since the initial policy was published in 1980. While flexibility is provided, deviations from the norms of the enforcement policy require approval or consultation with senior NRC officials, and in some cases, the Commissioners.

(a) If the enforcement program as implemented does not provide an appropriate degree of consistency and predictability, what are the problem areas and what changes could be made for improvement in this area?

It is important that implementation of the enforcement program strikes a reasonable balance between consistency and the exercise of judgment. In this context, industry believes that there is room for improvement at the regional level. Specifically, senior regional management should exercise more control over which violations are designated for enforcement conferences. Currently, there seems to be a practice of assigning a matter for an enforcement conference if an individual inspector or NRC

manager believes that escalated enforcement action may be warranted, even in marginal cases or in cases where issuance of a civil penalty is unlikely to be warranted. Senior regional management appears to believe that the inspector or manager should have his or her "day in court" or that a licensee should have the burden of proving that a civil penalty is not warranted for a violation. This practice imposes substantial burdens on licensees without, in most cases, achieving a commensurate improvement in safety. Preparation for an enforcement conference is time consuming and often diverts the attention of senior licensee management from other, safety-significant matters. Therefore, a licensee should not be requested to attend an enforcement conference unless senior NRC regional management believes, based upon their experience and judgment, that it is likely that the enforcement conference will result in a recommendation to issue a civil penalty.

(b) Should the enforcement policy be simplified and allow for more staff judgment and issuance of enforcement actions with less management review? If so, provide examples where changes could be made. If so, why and how?

At issue is not the simplicity or complexity of the enforcement policy. Rather, the question should be how to ensure that its implementation is consistent with the underlying policy objectives. We believe this can be done by focusing on issues of safety significance and ensuring that any enforcement action is further disciplined to identify the clear legal requirement violated and the factual basis for the conclusion that the violation occurred.

5. When developing enforcement sanctions, how should the NRC attempt to balance punishment and incentives? [Note: this question addresses issuance of sanctions in general, questions on issuance of civil penalties are addressed in Section E of this notice.] Comments are requested on whether the remedial value of enforcement would be improved by:

(a) Basing sanctions solely on the occurrence of the violation and its technical and regulatory significance to maximize the incentive to discourage violations from occurring. Under this approach, in formulating a sanction, NRC would consider whether the violation occurred, but would not consider whether the licensee identified the violation and corrected it and would not consider the licensee's past performance, i.e., some or all sanctions would be issued somewhat like a traffic ticket. For example, an overexposure would have a fixed penalty for a given type of licensee. Commenters who favor this approach should address the question of whether this approach would tend to discourage licensees and employees from identifying violations that are not self disclosing and broadly correcting violations as those actions would not affect the sanction.

(b) Basing sanctions solely on the licensee's response to the violation. Under this approach, NRC would not issue a sanction if the licensee promptly identified, report it if required, and promptly and comprehensively corrected the violation; that is the NRC would not consider past performance, duration, multiple occurrences, prior opportunities to identify and correct the violation earlier if the licensee identified and corrected the violation prior to NRC identifying the violation, the NRC scheduling an announced inspection in the area that encompasses the violation, or an event that disclosed the violation. Commenters who favor this approach should address the question of whether this approach would reduce the incentives to identify violations, including responding to opportunities to identify potential violations, or assuring lasting corrective action because the licensee may take the risk that NRC might not identify the violation as a result of the limited, audit nature of the NRC inspection program. How should reporting of a violation be considered? For example, should full mitigation be allowed if a violation was not reported?

(c) Basing sanctions on a combination of approaches, (a) and (b) above, similar to the current NRC approach. Commenters who favor this approach should address which factors should be included in establishing sanctions and the weight that might be appropriate for each factor.

Punishment is not and should not be one of the purposes or objectives of the enforcement policy. To the extent that sanctions are retained in the enforcement program, they should be utilized only to achieve the purpose of the enforcement policy -- namely to protect the public health and safety by ensuring that violations are identified and corrected and potential future violations are deterred.

Because the enforcement program should not be punitive in nature, an enforcement sanction should not be issued like a traffic violation. If issuance of an enforcement sanction is not necessary to protect the public health and safety, or if issuance of an enforcement sanction would divert NRC and licensee attention and resources from matters that are more important to safety, an enforcement sanction should not be issued.

Furthermore, the enforcement program should strike a balance between the use of sanctions to achieve deterrence and positive incentives for identifying, reporting, and correcting problems. In the current implementation of the enforcement program, deterrence has been emphasized disproportionately. (See Attachment 1, Section C.1 of NEI's letter of October 21, 1994) The ends of the enforcement policy would be better served if incentives to identify, report (if required), and correct problems were strengthened. For example, the NRC could recast the policy to provide that penalties will not be issued for violations identified, reported, and promptly corrected by the licensee.

Currently, although licensee self-identification and resolution of problems significantly contribute to safety, the NRC only considers non-cited violations for relatively small, low-significance noncompliances. Consistent with the purposes of the enforcement policy and the NRC Principles of Good Regulation, this treatment should be extended to all instances where the licensee aggressively sought to identify and resolve the noncompliance. And, with respect to noncompliances with little or no safety significance, extensive use could be made of a "nonmaterial discrepancy" or some other suitable term having the same attributes and practical features as non-cited violations.

Question A.5(b) inquires whether the approach recommended above "would reduce the incentive to identify violations . . . or assuring lasting corrective action" because a licensee may take the risk that NRC might not identify the violation through its audits. In fact, just the opposite would occur. If the NRC were to establish positive incentives for identification, reporting, and correction of problems, it is more likely (rather than less) that a licensee will take the initiative to identify, report, and correct problems.

6. The enforcement policy is intended to provide regulatory messages to improve performance such as encouraging identification of violations, being responsive to information that may suggest the need to take action to determine the existence of a violation, taking prompt, comprehensive and lasting corrective action, and addressing performance problems.

(a) Does the enforcement correspondence that transmits the enforcement actions adequately convey the above messages?

(b) Does the enforcement correspondence that transmits the enforcement actions adequately convey the significance the NRC places on the violations, the areas where improvement in performance are needed, and the reasons for the sanctions?

(c) Is the enforcement correspondence understandable? Should it be simplified? If so, how?

The approach used in the current enforcement correspondence has two serious deficiencies.

First, enforcement correspondence as well as inspection reports tend to gratuitously identify "weaknesses." Often such perceived "weaknesses" do not constitute violations of regulatory requirements but, nonetheless, are areas in which NRC believes improvements should be made. When enforcement correspondence identifies a "weakness," the NRC, in essence, is requesting that a licensee upgrade its programs or

take other management action. This request constitutes an attempt by NRC to obtain general improvements in performance and, thereby, raise regulatory standards beyond regulatory requirements. Such action is not an appropriate function for NRC's inspection and enforcement programs. Instead, the enforcement program and its underlying policy should be focused on identification and correction of violations of NRC regulations. The NRC should adopt new standards only through the required formal and generic processes -- revising its rules and regulatory guidance in accordance with the Administrative Procedure Act and backfit process.

Second, the correspondence for escalated enforcement action often uses vague terms, such as "programmatic breakdown" and "ineffective management." Such terms provide little useful information. However, they have important negative impacts on the licensee as described above The enforcement correspondence should avoid such terms and instead identify specifically which aspects of the programs and management did not comply with regulatory requirements. (See Attachment 1, Section B.2 of NEI's letter of October 24, 1994).

For the reasons set out above, the content of enforcement correspondence should be limited. For example, in the case of an NOV, the transmittal letter has no legal effect and should only provide that factual information relevant to its receipt and response. (See the response to Question 2 above).

7. Should there be different enforcement policies and procedures (e.g., correspondence, enforcement conferences, inspection documentation, civil penalty assessment factors) for large licensees, such as power reactors and major fuel facilities, than for smaller licensees? If so, how should the policies and procedures differ?

The enforcement policy should not differentiate between larger and smaller licensees in the areas mentioned in this question. Instead, to be true to the principles underlying the enforcement policy, the implementation of the enforcement program should reflect differences in the safety significance of violations. Since research reactors and materials licensees, including major fuel facilities, do not have radionuclide inventories or heat sources comparable to power reactors, violations involving these licensees usually involve relatively little potential for impacting the public health and safety. Therefore, it is reasonable to expect that implementation of the enforcement program may produce different results for these licensees than for power licensees.

B. SEVERITY LEVELS OF VIOLATIONS

Violations are normally categorized in terms of five levels of severity to show their relative importance within a particular activity area such as "reactor operations" or "health physics." The level of severity assigned is intended to be based on the violation's actual or potential safety consequence and regulatory significance within the selected activity area. Specific examples of severity levels for particular violations are given in the enforcement policy supplements to improve consistency and enhance the ability to apply the policy.

1. Should the NRC continue to use the existing severity levels to categorize regulatory and safety significance of violations? If not, why not and how should the enforcement policy be changed?

The use of severity levels is consistent with the objectives and purpose of the enforcement policy. The policy should focus on safety significance and should reflect the fact that the safety significance of violations varies. Clearly and objectively identifying the safety significance of a violation is essential to establishing appropriate sanctions for the violation, as well as the level of NRC and licensee management attention warranted. Assignment of severity levels serves this purpose and should be retained.

In practice, the enforcement program has not always preserved the focus on safety. Escalated enforcement action frequently has been taken based upon noncompliances that the NRC concedes have no or negligible safety impact. Although in some cases such enforcement has been justified by NRC on the theory that a similar problem occurring elsewhere or under different circumstances might possibly be safety significant, this connection has often been, at best, tenuous. In other cases, NRC has justified escalated enforcement action for violations which admittedly have no safety significance, based on the judgment that the violations cumulatively represent a programmatic or management breakdown. However, such judgments are highly subjective. NRC should not classify a number of violations as a programmatic breakdown unless there is a clear trend in the violations. NRC should not issue an escalated enforcement action unless the violations clearly have a significant potential for a safety impact.

2. Is there a benefit to have both a Severity Level IV and V? Should severity levels be used at all if violations are not associated with a civil penalty?

Currently, there is little real distinction between violations categorized as Level IV or V. However, that is not to say they should be combined. Instead, the better

course of action is to link severity levels to safety and make a clear distinction between Severity Level IV and V. In that case, the distinction between Level IV and V would be helpful to licensees in allocating resources for corrective actions.

In particular, Severity Level V should be assigned to violations that involve paperwork or administrative activities (e.g., failure to properly document a condition, an error in a calculation that does not affect any conclusions, an inadequate procedure, failure to comply with an administrative procedure). Alternatively, this severity level could be replaced by a "nonmaterial discrepancy" which would not have any accompanying enforcement action. Severity Level IV should be assigned to violations which actually affect plant conditions (e.g., misalignment of a valve, maintenance activity that results in a deficient or nonconforming hardware condition, violation of an action statement for a limiting condition for operation). In this way, the enforcement policy would draw a clear and helpful distinction between Level IV and Level V violations.

3. Recognizing that not all violations are of equal significance, are there sufficient examples to categorize the range of significance of violations?

(a) Do the existing examples appropriately reflect significance? If not, why not?

(b) If the existing examples are not sufficient, what other examples should be included?

(c) Should the examples be revised to be more general? More specific?

(d) Is sufficient flexibility provided to consider willfulness and other circumstances? What circumstances not now considered should be considered? if any, in establishing a severity level?

The enforcement policy currently contains a number of examples to categorize the range of significance of violations and identify extenuating circumstances. In fact, NRC staff frequently evaluates a licensee action or failure to act against the numerous examples in the enforcement policy supplements in an attempt to find the best fit rather than evaluating the action on its merits. The industry believes that the following improvements could be made:

- As discussed above in response to question B.2, the distinction between Severity Level IV and V violations should be more clearly based on differences in safety significance.

- As discussed above in response to question B.1, the enforcement policy should be modified to more clearly indicate that a "breakdown" requires the existence of a clear pattern or trend, and a Severity Level III violation should not be issued for a "breakdown" unless the "breakdown" had a significant potential for affecting the safety of the plant. For example, many "breakdowns" in paperwork have little or no potential for affecting safety and should be classified as a "nonmaterial discrepancy" without any enforcement action.

- Many of the examples of Severity Level III violations do not involve an actual safety impact but instead involve conditions that potentially might have had a safety impact if a different set of circumstances had existed. In such cases, the enforcement policy should recognize that the probability of an actual impact was sufficiently small that the violation should not be classified as Severity Level III.

- Most of the safeguards violations in Supplement III of the enforcement policy are assigned a severity level that is disproportionate to their actual or potential safety impact. By their very nature, most safeguards violations do not have any impact on safe operation of the plant. Equating such violations with the violations in "Supplement - Reactor Operations" gives the safeguards violations undue significance and tends to distract licensee management from matters that are more important to safety.

- Some of the examples have no apparent relation to actual or potential safety significance. For example, under Reactor Operations, an example of a Severity Level III violation is "Inattentiveness to duty on the part of licensed personnel." While such inattentiveness is clearly not desirable, the safety significance of inattentiveness, depending on the circumstances involved, can vary widely. This example therefore provides little guidance in evaluating the actual severity, from a safety standpoint, of a violation. Similarly, essentially all of the matters discussed in "Supplement VII - Miscellaneous Matters" in the enforcement policy have no direct connection to safety significance. For example, violations of 10 CFR § 50.7 are classed as Severity Level I, II, or III, even though in many cases the underlying employee concern was invalid or not significant from a safety standpoint and the violation was based upon a subjective, retrospective review of complex personnel matters involving "mixed motives." Automatically placing all such violations on a par with such matters as sleeping operators or the

TMI accident distorts the true significance of safety important matters.

C. ENFORCEMENT CONFERENCES

The enforcement policy provides that when the NRC learns of a potential violation for which escalated enforcement action may be warranted, the NRC normally provides the licensee an opportunity for an enforcement conference prior to taking enforcement action. A conference may also be held for a Severity Level IV violation if increased management attention is warranted. The purpose of the conference is to discuss the potential violations, their significance, the reason for their occurrences including the root causes, and the licensee's corrective actions. It provides NRC management an opportunity to emphasize, directly with senior licensee management, the significance of the violations and the need for effective lasting corrective action. Also, the NRC uses the conference to determine whether there were any aggravating or mitigating circumstances, and to obtain any other information, including whether the licensee questions the findings of the inspection, which may assist in determining the appropriate enforcement action. Enforcement conferences are not routinely open to the public.

1. Do enforcement conferences serve the purposes stated above? If not, how can they be improved?

Enforcement conferences are described in 10 CFR Part 2, Appendix C, Section V. As specified therein, the purpose of enforcement conferences is predominantly fact finding. Through enforcement conferences, the Commission expects that the NRC staff will discuss the alleged violation with the licensee to ascertain facts which will help in assessing whether a violation occurred, the potential safety significance for the licensee, and its root cause so that steps can be taken to preclude any reoccurrence. Also, the enforcement conference provides an opportunity to present aggravating and mitigating circumstances and any other facts which will help the NRC determine what, if any, enforcement action is appropriate.

The purposes listed in Part 2 differ from those in the introductory paragraph to this question. The enforcement policy does not refer to an "NRC management . . . opportunity to emphasize, directly with senior licensee management, the significance of the violations and the need for effective lasting corrective action." This expansion of the use and purpose of NRC enforcement conferences underscores a significant departure from the intent of the Commission. It is the source of many of the industry's concerns with the implementation of the enforcement policy.

Use of such conferences for "management emphasis" in particular implies a level of prejudgment that should follow, not precede, the enforcement conference and final NRC determination regarding what enforcement action is appropriate. It is also

inappropriate to use the enforcement conference to "suggest" improvements to licensee programs where such improvements are not required by regulation

2. What are the benefits and weaknesses of conducting enforcement conferences?

Enforcement conferences are valuable to ensure that the NRC fully understands the facts and circumstances of any alleged noncompliance and associated corrective actions. Enforcement conferences, as they are described in the enforcement policy, are to provide a free, open, and frank discussion of the facts, issues and concerns of both the licensee and the NRC. Through a full airing of the facts, the safety significance of the matter and whether it constitutes a violation can be ascertained. Mitigating and escalating factors can be considered. Most importantly, however, the licensee is provided the opportunity to fully explain the root causes discovered, and describe corrective actions and programmatic changes imposed to prevent recurrence. The NRC has an opportunity to probe and fully understand the root causes, and to satisfy itself that the corrective actions identified by the licensee are appropriate.

However, the current process of conducting enforcement conferences does not achieve those goals. In many cases, enforcement conferences are held based upon misunderstood or incomplete information, or unresolved disagreements (sometimes within the NRC staff) regarding the meaning of regulatory requirements. In some cases, an enforcement conference is prematurely convened because the NRC staff has not yet gathered and analyzed sufficient information to determine the nature and significance of the violation. Follow-up inspections and management meetings are more efficient means for gathering information until such certainty is established. In addition, in many cases, enforcement conferences are used to impress NRC's views on licensee management with respect to management techniques and other matters not governed by NRC regulations, with the result that the conferences lose their focus on developing the facts in order to evaluate whether actual violations of NRC requirements have occurred.

3. In deciding whether to hold a conference, should the NRC consider whether the licensee desires to attend a conference?

In deciding whether to hold a conference, NRC should consult with the licensee to decide whether there is value to holding the conference. Prior consultation with the licensee can only aid the NRC in gathering the necessary information to make a sound determination regarding enforcement action -- including whether an enforcement conference is necessary at all.

While there is no current regulatory requirement that enforcement conferences take place, licensees generally value the opportunity to ensure that the NRC has complete information on potential enforcement matters. By contacting the licensee

prior to scheduling a conference the licensee can suggest when the desired information will be collected and fully analyzed. In the current practice, very often enforcement conferences are scheduled less than a week after release of the inspection report first identifying the violation. Such a short time period leaves little time for the licensee to collect the relevant data and to prepare a complete description of the full scope of corrective actions and preventive measures.

4. Is the current criteria used to hold a conference appropriate? If not, when should conferences be held?

The current policy provides that enforcement conferences are not normally held for Level IV violations unless other factors suggest that a conference is warranted. The industry believes that enforcement conferences for Level IV violations should not be held. Elimination of enforcement conferences for potential enforcement actions at this level would avoid the expenditure of agency and licensee resources on matters of relatively low safety significance.

5. Recognizing that apparent violations may be reconsidered following an enforcement conference, should NRC continue the practice of issuing inspection reports that address the apparent violations prior to an enforcement conference?

It is exactly because apparent violations may be reconsidered following an enforcement conference that the NRC should continue the practice of issuing inspection reports prior to the enforcement conference. Issuance of the inspection report puts the licensee on notice of the precise violation that is alleged. While many licensees are informed orally of the apparent violation, they often find that its characterization in the subsequent inspection report is substantially different. Without being fully apprised of the NRC's concerns before the conference, the conference may be of little benefit for information gathering.

Prior notice of the apparent violation is essential to the licensee to effectively present relevant information and root cause identification. Gathering such information that will help the NRC understand all the relevant information takes time. The process of evaluating the claimed violation, gathering relevant information and coordinating it into an understandable presentation that is helpful to the NRC is manpower intensive. Paragraph 3.9.2 of the NRC's Enforcement Manual provides that licensees should be informed of the staff's intent to conduct an enforcement conference at least two weeks in advance of the scheduled conference and should have the inspection report at least one week in advance. In practice this guidance is not always adhered to. For most violations, we believe that two weeks minimum notice would be sufficient, provided the inspection report is simultaneously released containing the description of the apparent violation. However, more time should be provided for multiple or technically

complex violations. The current practice tends to compress the time licensees have to prepare, thereby increasing the potential for information presented to be incomplete or poorly organized. The current process should be revised to allow more timely notice to licensees of the precise issues to be discussed at the conference.

6. Enforcement conferences are normally held in regional offices. Should this continue, or should they be held closer to the facility of the licensee?

Conferences should be held at the location that best facilitates information collection. No one venue will be best for all conferences. For matters where there may be a large number of licensee personnel needed for the conference, the best choice would be to hold the conference at or near the site. In other cases, the NRC regional offices might be more convenient. The cost and impact on the conference participants, both licensee and NRC, should be considered on a case-by-case basis in choosing an appropriate location.

7. As to open enforcement conferences:

NEI has already provided substantial comments on NRC's Two-Year Trial Program for Conducting on Open Enforcement Conferences; Policy Statement 57 Fed. Reg. 30762 (July 10, 1992). Please refer to NEI's July 11, 1994, letter to the Secretary of the Commission on that subject. Responses to individual questions below follow the themes suggested in that letter.

(a) Have open enforcement conferences affected NRC performance during the conference? If so, how?

To the extent the industry is able to assess NRC performance, it appears that open enforcement conferences have caused the NRC to become more circumspect in its questions and less probing of licensee responses. Further, public attendance at these conferences tends to stilt communications on both sides and reduces the value of the conferences. In open enforcement conferences, licensees have observed that NRC conference participants have also been forced to simplify technical terms, and engineering analyses and concepts in order to make them more understandable to those less familiar with the technical aspects of plant operation. It is not clear that the additional impact on the licensees and the NRC of having open enforcement conferences is at all balanced by the value received by these very few members of the public who attend.

(b) Have open enforcement conferences impacted the licensee's participation in the conference? If so, how?

The presence of the public and media have affected in varying degrees the amount and type of preparation licensees felt were necessary for the open conferences. Some licensees spent significantly more time preparing for open enforcement conferences and involved senior management to a greater extent solely because the public might be present. In each case, increased preparation and involvement of senior management occurred regardless of the severity or safety significance of the potential violation; the substance of the licensees' corrective actions was not affected by whether the conference was "open."

(c) Have open conferences impacted the licensees' cost of participating at conferences? If so, how? If more preparation is required, how substantial is that preparation and why should the presence of public attendance impact the licensee's presentation?

The impact on licensees should be evaluated in terms of the person -hours diverted from working on potential safety and other issues. As discussed above, both licensees and the NRC have expended more resources, simplifying complex engineering and technical terms, engineering analyses, acronyms and nuclear industry-specific concepts so that they may be readily understood by uninitiated members of the general public and by the media.

(d) Has the public benefited from the ability to observe enforcement conferences?

Public interest in open enforcement conferences has been extremely low. According to information collected from NEI reactor licensees (the only class of licensees to whom the open conference policy applies) only 52 persons, other than NRC staff and utility participants, attended the 34 open enforcement conferences conducted during the origina! trial term. Of those 52 persons, 16 were in attendance at one conference. Only 36 people attended the other 33 conferences combined. Of those, 15 represented other licensees or state agencies. Accordingly, on average, less than one member of the general public or media attended each conference. Perhaps most telling is that for more than one third of the conferences (i.e., 12 conferences,) no one other than the NRC or utility personnel attended.

Based on the resounding lack of public interest in open enforcement conferences, the additional effort expended by both licensee and NRC regional staff participants and the costs of those efforts which are ultimately borne by the public, the program has proven a net negative benefit to the public Therefore, open enforcement

conferences should be discontinued because they do not provide a benefit that is commensurate with the overall costs. In a perfect world, the mere fact that a conference is open to the public and the media would have no effect on the conference participants. However, people act and talk differently if each word chosen may be quoted or potentially misunderstood. That fact significantly and adversely affects the ability of the open conference to be as effective as it should be.

(e) Should all enforcement conferences be transcribed with the transcript subsequently made public? For those who oppose open conferences, would that be a viable alternative to open enforcement conferences?

In addition, transcription of the conferences further constrains the dialogue and stilts communication. Further, the lack of public interest in open enforcement conferences demonstrates that any effort at recording these conferences, beyond the meeting summaries already being prepared by the NRC and placed in the public document room, are a waste of taxpayer and ratepayer dollars. Meeting summaries and copies of slide presentations, currently placed in the Public Document Room have not been found to be insufficient for interested members of the public to understand the exchanges that took place in the conference. And the implication that statements in the transcript could serve as the basis for some separate action against meeting participants will surely cause the desired open dialogue to be constrained. A return to the conduct of enforcement conferences as an information collection mechanism to assist the NRC in exercising its prosecutorial discretion is the best alternative.

(f) The NRC staff in Rockville, Maryland frequently participates in closed enforcement conferences held in the region by telephone.

(i) Is that appropriate for open conferences?

The NRC should include any members of the staff it believes are necessary to collect and analyze the relevant information and fully probe the issues. A conference by telephone is generally a better use of resources than flying staff to a distant location for the conference.

(ii) Should the public be allowed to listen by telephone to open conferences?

Whether the public is physically present or listening by telephone makes little difference. If the public participates, or even attends, the burden associated with translating technical terminology and concepts into more understandable form suitable to the general public must be borne by both the NRC and licensees as described previously. The lack of public interest demonstrated in the nationwide, two year trial shows that there

is likely to be negligible public interest in even participating by telephone. And for the additional reasons stated previously, the principle of open enforcement conferences should be reconsidered on the basis of what is truly in the public interest.

If, however, NRC decides to conduct open conferences by telephone, interested members of the public willing to bear the cost of long distance telephone calls should not be barred from listening. However, under no circumstances should licensees be charged for the teleconferencing costs or for a toll-free service that the NRC established for this purpose.

(g) Should open enforcement conferences be made a permanent part of the enforcement program?

No. See responses to questions C.7.(a) through (f)(ii) above.

8. Are there circumstances where a Demand for Information may be an appropriate substitution for an enforcement conference? If so, what circumstances should be considered?

It is difficult to imagine a situation where a formal Demand for Information would be preferable to an enforcement conference to collect information. In either case, the more formal interactions should be preceded by less formal discussions with the licensee. Based on industry experience, we believe information gathering is most effective where licensees and staff discuss areas of mutual concern, probe the other's positions and identify areas of agreement and disagreement. Formal Demands for Information are better suited to adversarial processes where persons subject to NRC jurisdiction may not be forthcoming with adverse information. In NRC enforcement actions, licensees frequently identify the deficiency and make timely reports to the NRC. Licensees typically seek NRC feedback on safety issues, whether or not they involve an apparent noncompliance. Given overall licensee responsiveness, Demands for Information seem unnecessary, severe and formalistic. Worst of all, they are a less effective information gathering tool.

D. NOTICES OF VIOLATIONS

The policy of the Commission has been to formalize the occurrence of a violation by issuance of a Notice of Violation and by requiring documented corrective action.

1. There are circumstances provided in the enforcement policy for not issuing a formal notice of violation to provide incentives for identification and corrective action for violations at Severity Level IV, as well as to save both NRC and licensee resources for violations at Severity Level V. In general where the licensee has identified a non-recurring violation at Severity Level IV and taken appropriate corrective action, the inspection finding is documented in the inspection report and closed out as a "non-cited violation," with no written response required.

(a) Should the circumstances for use of non-cited violations be changed to cover more situations or fewer (including different severity levels)? If so, explain.

The circumstances for which non-cited violations are used should be expanded. The incentives currently provided for identification and corrective actions for Level IV and V applications are equally applicable to higher severity levels. In fact, greater positive incentives would better attain the objectives and purpose of the enforcement policy for noncompliances in higher severity categories because of the increased safety associated with identification and correction of safety-significant violations. Closing out inspection items with non-cited violations is appropriate for licensee-identified and reported noncompliances for which the licensee has taken prompt and appropriate corrective actions. Under those circumstances, there is no positive benefit obtained from issuing a violation or imposing a civil penalty. The purpose and objectives of the policy have, at that point, already been realized. Any punitive sanctions only create a disincentive to future identification of noncompliances and degrade a necessary open and cooperative relationship between licensees and the regulator to identify and resolve problems.

(b) Does the use of non-cited violations contribute to providing an incentive for identifying and correcting violations or does it have the same negative impact as a cited violation in a Notice of Violation?

Use of non-cited violations provides positive incentives to licensees for identifying and correcting noncompliances. Use of non-cited violations also provides a means for the NRC and the public to track those noncompliances that do occur,

notwithstanding licensees' solid and rigorous programs. This record helps provide identifiable criteria on which to objectively evaluate licensee performance. Through inspection reports and close out reports available in the public document room, interested members of the public are able to monitor NRC performance in ensuring that noncompliances are corrected. They are also able to see the licensees' self-examination and improvement efforts. While no violation should be imposed where there has been self identification and appropriate corrective action, the use of non-cited violations at least provides a positive incentive for good practices. For that reason, it should be used in all circumstances where the licensee self-identified a problem and took timely corrective action, regardless of whether the matter involved a matter of nonsafety significance. For example, the FAA, carrying out a similar public health and safety mandate to that of the NRC but arguably in an even more direct daily context, does not employ the practice of issuing violations for aircraft manufacturer identified problems that are corrected in a timely manner.

(c) Should non-cited violations be treated any differently from a cited violation when considering compliance history in the deliberations on the appropriate regulatory response to a subsequent violation? If so, explain.

To the extent that non-cited violations are granted only where the licensee has fully satisfied the objectives and purpose of NRC's enforcement policy, that commitment to safety should be heavily weighed in evaluating the appropriate regulatory response to a subsequent violation. Past violations are relevant to subsequent violations only where a clear and direct connection exists, such as reoccurrence of the same precise problem due to the same root causes or failure to properly implement appropriate corrective actions.

(d) Should NRC continue to use non-cited violations?

Non-cited violations are one way for the NRC to balance the objectives of the enforcement policy by providing positive incentives for desirable practices in addition to the punitive sanctions already in use. See the responses to questions (a) through (c) above. In addition, the NRC should consider using a category of "nonmaterial discrepancies" to more accurately describe those noncompliances which have no safety impact. No enforcement action should be taken for a nonmaterial discrepancy.

(e) If non-cited violations should not be used in the future, how should the NRC disposition findings in an inspection report that provides sufficient detail to demonstrate that a violation occurred? How should NRC track these findings and what should they be called?

That use of non-cited violations should be continued and expanded for the reasons and in the manner as described above. Use of non-cited violations balances the need for positive incentives with NRC corrective action tracking and public visibility of the enforcement process. As noted above, we also recommend the use of "nonmaterial discrepancies" for noncompliances which have no safety impact. A nonmaterial discrepancy could be tracked in a manner similar to noncited violations.

2. Is there any purpose to issuing Notices of Violations at Severity Level V? Should all such violations be treated as non-cited violations?

As noted in response to questions A.3.(b)(i), A.3.(c)(ii), and B.2. above, severity levels should be reconnected to safety significance. Wholly independent from severity levels, use of non-cited violations should be linked to licensee identification and responsive corrective actions. Because the two have independent bases, it is not inconsistent that a Level V violation might be grounds for a violation and a Level III violation be non-cited because of the licensee's prompt identification of the problem and thorough corrective actions. In general, however, the NRC should eliminate the practice of issuing violations for matters having little or no safety significance. Issuance of violations for such matters causes substantial diversion of management attention and resources for no real benefit.

3. Should all Notices of Violations require a written response? If not, what should the documentation requirements be for corrective action? What access rights should be given to the public to review the documentation?

Any event significant enough to warrant issuance of a formal Notice of Violation by the NRC is significant enough to warrant a written response from the licensee acknowledging the notice and either refuting it or acknowledging it. This information is and should remain available to interested members of the public through the public document room. For these reasons, care should be taken that only matters of real significance from a safety perspective are made subject to enforcement action and that the transmittal letter forwarding a NOV be confined to the facts relevant to receipt of and response to the NOV.

4. The materials program utilizes NRC Form 591, " Safety Inspections," which an inspector may use to document certain violations and after the licensee signs the form stating that corrective action will be taken within 30 days, serves as a Notice of Violation. Form 591 is intended to be issued by the inspector directly to the licensee without further agency review at the conclusion of the inspection.

(a) Should this process be expanded to cover fuel cycle and reactor licensees?

(b) Should this process be expanded to cover other enforcement sanctions?

The most useful step that the NRC could take is to assure that its inspectors give a licensee a full opportunity to address their concerns before they become documented as violations. If the licensee fully understands an inspector's concern, it is often able to provide information which will demonstrate that no violation has occurred or that it should be treated as a non-cited violation. In instances where matters cannot be resolved immediately, but the licensee believes it will be able to demonstrate that no violation occurred or that appropriate action has been or is being taken, it is often useful to treat the subject as a follow-up item which can be resolved upon reinspection. Resolution of appropriate matters in the course of an inspection or follow-up discussions is highly beneficial since it avoids the substantial staff time and paperwork associated with the NRC's issuance of a citation, the licensee's preparation of a response and the NRC's close-out of the item.

It is possible that in the course of such full communication of information a licensee could acknowledge that a violation took place and will describe the corrective action taken or planned. In those situations where the inspector finds the corrective action to be acceptable, the inspector should be able to close out the matter in the inspection report without the need for further licensee response or subsequent evaluation by the NRC. We believe that inspectors should be given the authority to close out such instances with the licensee, without having to obtain NRC management approval.

We do not believe that a specific form, such as NRC Form 591, is necessary or desirable to accomplish this objective.

E. CIVIL PENALTIES

A civil penalty is a monetary penalty that may be imposed for certain violations. Civil penalties are intended to emphasize the need for lasting remedial action, and to deter future violations both by the licensed party and by other licensees conducting similar activities.

The base civil penalty amounts have not been changed since the early 1980's. To maintain a constant dollar amount for civil penalties, adjustment for inflation would increase the current amounts by more than 60 percent. For smaller licensees, a civil penalty may be a deterrent because of the financial impact; for power reactor licensees, the current civil penalty amounts are of little financial impact, but may have a deterrent effect through the adverse publicity that attends the issuance of a civil penalty.

1. Should civil penalties continue to be part of the NRC regulatory process? If not, why not? How and when should they be used?

The enforcement policy has four stated objectives -- ensuring compliance, obtaining prompt corrective action, deterring future violations, and encouraging prompt identification and reporting. However, civil penalties and other sanctions are directed only toward attaining the third objective -- deterring future violations. Civil penalties lend no support in meeting the other three objectives. Unless carefully applied, civil penalties can actually provide a disincentive to licensee identification and reporting of potential problems. Only by balancing incentives for prompt corrective actions, identification and reporting, and continued inspection to ensure compliance can all four objectives of the policy be achieved.

2. Have civil penalties been effective in improving compliance and providing deterrence? If so, why? If not, why not?

Civil penalties have probably made some contribution to improving compliance and providing a deterrence for future non-compliance. However, safety performance and regulatory compliance are improving primarily because of other tremendous incentives that exist for strong performance. Licensees recognize that plants that run well -- safely and without regulatory problems -- are more economical to operate. Plants which experience shutdowns because of safety problems or other regulatory problems also become more expensive to operate. The experience is common to all classes of licensees. No licensee can afford to have its investment idled by inattention to safety or regulatory compliance.

3. The Review Team on Reassessment of the NRC's Program for Protecting Allegers Against Retaliation concluded that higher civil penalties are appropriate and recommended a statutory amount of $ 500,000. The legislative history for section 234 of the Atomic Energy Act does not provide a specific basis for the current statutory amount of $ 100,000. The recommendation of that Review Team was based on the average cost of a day of replacement power for a power reactor. The recommended increase was intended to provide a more financially relevant penalty and provide for a greater spread of penalty amounts among the severity levels. (See, NUREG 1499 at page II.D-5-6)

(a) Given that significant violations continue to be identified, and that civil penalties are intended to have a punitive aspect, would higher civil penalties provide a greater incentive for compliance for the larger licensees regulated by the Commission?

The Review Team on Reassessment of the NRC's Program for Protecting Aliegers Against Retaliations' conclusion that higher civil penalties are appropriate and recommendation of a statutory amount of $ 500,000 is not consistent with the NRC's actual experience with enforcement in the 1990's. No basis exists for broader imposition of more severe sanctions. Moreover, the preface to this question reveals confusion over the proper role of enforcement in the NRC's regulatory structure. Proponents of more severe sanctions see the enforcement program as one which stands alone. They fail to see enforcement as an integrated part of the greater defense-in-depth including regulations, inspections and licensee programs. Violations of regulations as detailed and as complex as those published by the NRC will occur. The suggestion that more severe sanctions are necessary because violations continue to occur is not supported by experience -- safety performance has improved, and the safety significance of violations has decreased, without any increase in penalty amounts.

The industry strongly opposes the recommendation to increase civil penalties to $500,000 per day per violation. As Commissioner de Planque and Commissioner Remick observed at the January 31, 1994, Commission briefing, there has been no reasonable basis provided for adjusting the civil penalty amount from $100,000 to $500,000. Current civil penalties and the attendant adverse publicity already provide a strong deterrent effect.

(b) Should the statutory amount of civil penalties be increased? If so, to what extent? If not, why not?

As discussed above, there is no credible basis for an increase in the statutory civil penalty. Licensees are already zealous in identification, reporting and correction of noncompliances. Other incentives for excellent safety performance and

meticulous regulatory compliance provide an argument for a decreased need for civil penalties generally, not a need to increase their amount. The problem with enforcement under the current policy is not that sanctions are an inadequate tool, but that they are often applied to matters not significant from a safety perspective and are not well-balanced with positive incentives. Increased sanctions will not make the enforcement program more effective.

(c) Since the civil penalty amount in Section 234 of the Atomic Energy Act was last amended in 1980, there has been considerable inflation. Should the base civil penalties be indexed for inflation?

No. There is no evidence that increases would serve to improve compliance or safety performance. Performance has substantially improved during this period without any increase in penalty amounts. See the answers to questions E.1 through E.3.(b) above. See also Section I.C.2. of Attachment 1 to NEI's letter of October 24, 1994.

(d) Should the civil penalty amount take into consideration the costs associated with an enforcement action including the cost of the investigation and processing the action?

Even in those rare instances where the imposition of a civil penalty may be appropriate, assessing the individual licensee for the cost of processing the penalty and investigation would be extraordinary and unjustified. Charging licensees the costs of investigating and processing civil actions penalizes licensees who challenge a civil penalty. Even if the licensee were charged with the costs of perfecting the civil penalty after judicial review, shifting the costs would provide an unfair disincentive to licensees with legitimate challenges to proposed penalties. If such a proposal were adopted, reciprocal provisions which would reimburse licensees for the costs of challenging unwarranted enforcement actions would also be appropriate.

Furthermore, the NRC is without the statutory authority to assess costs associated with processing civil penalties. As discussed in the responses to the preceding questions in this section, there is no credible basis for a claim that harsher sanctions or higher civil penalties are warranted. Therefore, legislative action to authorize the assessment of costs is unnecessary.

4. Should the amount of the penalty be normally based solely on the existence of the violation similar to a traffic ticket? If so, why? If not, why not?

Basing the imposition of a civil penalty merely on the existence of some violation is unlikely to promote better compliance or safer operations. The imposition of

a civil penalty is not an end in and of itself, but one of the incentives available to the NRC to facilitate achievement of the enforcement policy's objectives. As discussed in the responses to the preceding questions, balancing the incentives is essential to achieving the policy's objectives and successfully meeting its purpose. Factors which are often more important than the mere existence of some identifiable violation include the safety significance of the violation; whether a clear, objective requirement is involved; whether the licensee identified and reported the violation; and whether the licensee promptly and thoroughly took corrective and preventive actions. The imposition of a civil penalty without first considering whether a net positive or negative regulatory response is warranted would undermine achievement of all of the enforcement policy's objectives.

(a) If not, are there some violations such as overexposures to workers, releases of radioactive material, exposures to members of the public, failure to use survey instruments by radiographers, etc, where civil penalties should be assessed without regard to adjustment factors? If not, why not?

As discussed in the answer to the preceding question, factors wholly independent of the existence of the violation should be considered in crafting the appropriate regulatory response. While safety significance is a primary factor to be considered in evaluating the appropriate regulatory response, it does not stand alone. A matter of high safety significance that is aggressively identified, reported, and corrected by the licensee should be considered for full mitigation precisely because it is that kind of violation that is most important to identify and correct and, therefore, where the most positive incentives for aggressive licensee action should be directed.

(b) Does it matter whether a penalty is increased or decreased from the base amount, or is the existence of a penalty the controlling factor?

The imposition of a civil penalty is the dominant consideration from the licensee perspective. Once a determination has been made that a civil penalty is to be imposed, escalation and mitigation factors are also important, but less significant, considerations. Licensees are encouraged by incentives in the form of mitigation, but these incentives are much stronger when complete avoidance of a civil penalty is possible.

5. Should the penalty consider contributing factors, such as the root cause of or the licensee's response to the violation? If so, why? If not, why not?

The licensee's root cause analysis and response to the discovery of a violation are among the two most important considerations in satisfying the objectives of the enforcement policy. Only through taking appropriate corrective actions is the overall safety of the facility improved. In cases where the licensee has identified the

noncompliance, appropriately reported it, and taken prompt and thorough corrective actions, these considerations should not just mitigate the penalty, they should vitiate it. To do any less sends a negative, potentially counterproductive regulatory message. Positive reinforcement for desired practices is more in keeping with the Principles of Good Regulation. In such cases, no civil penalty is appropriate.

6. The current adjustment factors are designed to encourage good performance (e.g., prompt identification, prompt and comprehensive corrective action, and evidence of past lasting corrective action) and deter poor performance (e.g., lack of identification and prompt or comprehensive corrective action, not being responsive to opportunities to identify violations, and not taking lasting corrective action). The NRC expends considerable effort to adjust civil penalties to provide an appropriate regulatory message.

(a) Should the current civil penalty adjustment factors continue to be used? If not, why not and which factors should be deleted or what factors should be added?

Civil penalty adjustment factors under the current policy require readjustment to realign them with their safety significance. Overall, the adjustment factors applied tend heavily toward escalation rather than mitigation, because the incentives used to craft the regulatory message consider more negatives than positives. For example, the total of all mitigation factors combined results in a 200% reduction, whereas the total of escalation factors comes to 450%. Beyond that, mitigation is limited because base proposed penalties (from Table 1A) must normally be at least 50% of the listed amount. The net effect of the heavy emphasis on escalation rather than mitigation is to overshadow the positive incentives in the enforcement policy and emphasize the punitive aspects at the expense of other policy objectives.

In addition to the heavy bias toward escalation rather than mitigation, caveats, rejoinders and limitations cause mitigation factors to be stintingly applied. For example, mitigation is not normally permitted where a licensee's performance was previously lacking, even though it now "appears to be clearly improving." Mitigation for self-identification is frequently reduced by overly broad interpretation of which events are "self-disclosing." Escalation factors, on the contrary, are liberally applied. Penalty escalation for prior opportunity to identify a deficiency is added, not only for prior NRC or industry generic notifications, but for "other reasonable identification" methods.

The net effect is that, as written and as practiced, the application of escalation and mitigation factors weighs far too heavily in favor of more severe sanctions. In the current regulatory environment, where licensees zealously self-regulate, civil

penalties are often counter-productive because of the imbalance in application of incentives.

(b) Do the current adjustment factors provide the intended incentives or deterrence? If not, please explain.

See the response to question E.6.(a) above.

7. Comments are requested on the use of the specific factors.

(a) Should there be any mitigation for self-disclosing events where the violation is relatively obvious, i.e., given the event, the licensee really has no choice but to pursue it to determine the cause? If not, why not? If so, why?

The staff tends to take a very expansive interpretation of self-disclosing events, to the point that many conditions discovered by the licensee's self-assessment, audit or quality assurance programs are classed as "self-disclosing." Thus, as used by the staff, categorization of a condition as "self-disclosing" tends to eliminate incentives for self-identification. It should be immaterial whether a potential problem was identified through the routine exercise of a licensee's responsibilities, such as an effective monitoring program, or through a more specific program of self-assessment in a particular subject area. Protecting public health and safety is achieved in either case, and no distinction should be made in how the licensee is credited for its actions.

In order to satisfy a clear objective of the enforcement policy -- prompt identification and reporting -- the positive incentive -- mitigation -- should be expanded. For noncompliances identified by the licensee and for which prompt and appropriate corrective actions have been taken, full mitigation or issuance of a non-cited violation may be appropriate. To do otherwise sends a regulatory message exactly counter to encouraging licensee identification and reporting of potential problems.

(b) Should mitigation be allowed for corrective action, if the individuals responsible for the violations, assuming adequate resources, training, procedures, and supervision, have not been appropriately disciplined? How extensive should corrective action be to permit mitigation?

NRC should use mitigation as a positive incentive to encourage prompt and appropriate corrective actions.

The focus, implied by the question, on punitive actions taken against individual licensee employees detracts from the effectiveness of the positive incentive. How a licensee handles employment-related matters is generally not a matter governed by

NRC regulations and should properly be within the sole responsibility of the licensee. In many cases, severe disciplinary actions are inappropriate for a human error, even if it led to cited a violation. In the vast majority of noncompliance issues, the human error is not willful. The proper corrective action most often is special or enhanced training to address a deficiency in the individual's knowledge or skills. Disciplinary actions can have unwanted negative effects in the form of lowered morale and decreased worker satisfaction, effect both of which are counter to safety. The NRC should not usurp licensee responsibility to manage its employees.

(c) Since enforcement should be designed to influence performance, should past poor performance be considered and cause penalties to be increased if current performance is good, i.e., the licensee identifies and corrects the particular violation assuming recent performance (e.g., six months) has been good and there has not been a failure to be responsive to opportunities of prior notice? Similarly, should past good performance be considered and cause penalties to be lowered where current performance is not good, i.e. the licensee does not identify and corrects the violations?

The enforcement program is intended to ensure compliance with objective regulatory requirements. Therefore, past performance may properly be considered, but should be one of the lesser factors because assessments of general performance level or performance trends are subjective, often difficult to make, and rarely agreed on even by the NRC staff. In addition, the NRC has been inconsistent in defining how broad or narrow the area of "past performance" should be (in one recent violation, the NRC noted that past performance in the particular area had been good, but declined mitigation because overall SALP performance had not been strong). This reduces the effectiveness of past performance as an incentive factor because of the unpredictability of its application. As such, the NRC should be very careful in use of past performance, even as a minor factor.

(d) The Atomic Energy Act provides that each day a violation continues shall be considered a separate violation for assessing a civil penalty. The longer a violation exists the likelihood of a consequence increases. Should duration be routinely considered if a civil penalty would otherwise be assessed? If not, why not and how should duration be factored into the amount of the penalty?

Under the current policy, base civil penalties may be escalated by 100% in order to send a strong regulatory message for particularly safety significant violations regardless of whether the licensee was or should have been aware of the violation. Further, Section VII.A.3 of the policy allows daily compounding of civil penalties for each day the violation continues in those cases where the license was aware of, or clearly should have been aware of the violation but failed to identify and correct it. The current

sanctions are sufficiently severe to provide ample deterrence. Compounding violations by simply counting days would create a negative disincentive to licensees for undertaking assessments and evaluations that may ferret out long-standing noncompliances. In light of already very good industry compliance and continuing improvement, a shift toward more severe or harsher sanctions is not warranted. In addition, it is not always true that violations of long duration are more likely to have consequences. The current policy is adequate in this regard.

(e) Should prompt, comprehensive corrective action by the licensee be sufficient to warrant full mitigation of the civil penalty, regardless of the other factors such as prior performance, duration, prior opportunities, and lack of identification or reporting?

Prompt corrective actions, like self-identification and reporting, are at the heart of the success of the NRC's enforcement policy. Every available incentive should be provided to encourage those practices. Prompt and appropriate identification and implementation of appropriate corrective actions should warrant full mitigation. Under those circumstances, where the licensee has taken all desired actions and where no undesired behavior or activity was involved (i.e., a knowing and willful violation) negative incentives like civil penalties serve little useful purpose. Full mitigation would be entirely appropriate.

(f) Should there be civil penalties if the licensee identifies and promptly and comprehensively corrects a violation? If so, how should factors such as repetitive violations, past poor performance, prior opportunities to have identified the violation earlier, multiple examples and duration be considered?

In those cases where the licensee identifies and promptly and appropriately corrects a noncompliance, penalties are inappropriate and, as noted in response to several previous questions, the violation should be considered for non-cited treatment. Licensee identification, reporting, and correction are exactly the good practices the enforcement policy seeks to encourage. Consistent with the NRC's Principles of Good Regulation, positive incentives should be provided for desired practices.

Repetitive violations for fundamentally the same matter indicate a failure of the corrective actions (i.e., a failure to adequately address the root causes of the earlier deficiency). However, if the licensee has made the appropriate corrective action, the lesson is already learned; negative incentives are not warranted and will not have any beneficial effect on the licensee's performance. Past poor performance is addressed in the response to subsection (c) of this question. Consideration of past performance, good or lacking, should be of only minor significance in a determination of civil penalties.

Additionally, missed opportunities to identify a deficiency are difficult in practice to identify objectively; they are always easier to identify in hindsight. Accordingly, they also should be given lesser emphasis in the evaluation of licensee conduct.

(g) Reporting is not currently considered as an assessment factor and reporting failures are considered for enforcement separate and apart from the matter not reported. How should reporting issues be considered?

(i) Should there be full mitigation if a licensee identifies a violation associated with a reportable matter, when the report is not properly made?

(ii) Should reporting a violation be considered a separate mitigating factor? If so, should mitigation be allowed where the matter reported was required to be reported since not to do so would be a separate violation subject to a separate sanction?

(iii) Should there be a separate sanction for reporting failures apart from the violation not reported?

The current practice treats reporting failures and the underlying reportable matter separately. This practice is consistent with the NRC's statutory authority, regulations and the objectives of the enforcement policy. Any sanction for the underlying violation should not be escalated for the failure to report since the reporting failure will be addressed separately. Penalizing the licensee for the same reporting failure in two distinct actions sends a confused and unnecessarily punitive regulatory message. Some cases should result in the underlying violation being treated as a non-cited violation because of the licensee's prompt and thorough corrective actions, while the reporting failure may warrant a separate enforcement action. Treating the issues separately is workable provided the separation properly focuses incentives and deterrents, and is consistently followed.

(h) In applying the factors of past performance and prior opportunities to identify violations, over what time period should these factors be considered (e.g., events that occurred two years prior to the violation for which the current sanction is being considered)?

As discussed in response to subsection (c) of this question, past performance should properly receive only minor consideration as an adjustment factor. Aggregating small numbers of events occurring over a period of several years generally is not useful in establishing an adverse trend given the number of personnel and activities involved in nuclear plant operation.

(i) Is it appropriate to consider the same facts in determining the existence of a violation, its severity level, and in the application of the assessment factors (e.g., in a corrective action violation escalating a penalty for opportunities to correct a matter earlier and considering the delay as added significance in establishing the severity level)? If not, why not?

Double counting of the same factors results in overly punitive sanctions and too negative a regulatory message. In some cases, several Level IV violations are aggregated and treated as Level III, then escalation factors for multiple occurrences are factored to compound the penalty. The resulting sanction is a penalty out of all relation to either the safety significance of the underlying violations or the objectives of the enforcement policy.

8. The enforcement policy provides some flexibility in applying the adjustment factors but it does provide specified percentages to limit the application of the factors.

(a) Should the enforcement policy be changed to permit consideration of factors without providing specified percentages that should be used for the assessment? If not, why not?

(b) If so, should there be any outer limit other than the statutory maximum per violation?

(c) The deletion of percentages will permit greater judgment and flexibility to arrive at an appropriate penalty. Will this create a concern for consistency and predictability?

The preponderance of escalation factors and scarcity of mitigation factors tend to tilt the outcome toward higher civil penalties regardless of the propriety of positive or negative incentives for licensee performance. Percentages may be helpful for the NRC to ensure generally consistent application of the policy among the regions. Some changes in the percentages and ceiling and floor amounts may be appropriate to place the various factors in proper proportion to their usefulness in meeting the policy objectives. For example, past performance should be relatively minor as compared to the adjustment for prompt, appropriate corrective actions.

9. Regional Administrators have been delegated the authority to issue civil penalties for certain materials cases without review by the Office of Nuclear Materials, Safety and Safeguards, Office of Enforcement, or the Office of General Counsel.

(a) Should delegation be similarly considered for certain reactor cases? If so, what cases warrant such delegation and why? If delegation is not appropriate, why not?

Given the seriousness with which reactor licensee's view enforcement action and the potential impact of such action in forums other than the NRC, delegation is not appropriate.

(b) Are there some violations for which the inspector or section chief should be allowed to issue proposed civil penalties without further agency review? (See question D.4)

No.

F. ORDERS AND CONFIRMATORY ACTION LETTERS

An order is a written NRC directive to modify, suspend, or revoke a license, or cease and desist from a practice or activity. A Confirmatory Action Letter is a document that reflects commitments made by a licensee which may in some cases reflect significant obligations. Unlike an order, it does not create legal obligations other than a reporting requirement if an obligation is not met.

1. Should orders be used to a greater or lesser extent than at present?

The current enforcement policy defines the types of orders and the specific circumstances when their use is appropriate. In general, orders are used when the NRC believes that immediate action is required to protect public health and safety, or when the violation involves willfulness, and no basis reasonably exists for not taking the action as proposed. While an order is not required or appropriate in all circumstances, for example, the NRC has effectively used the less formal alternatives available (e.g., Confirmatory Action Letters or Demands for Information), there may be circumstances where a formal proceeding under § 2.202 should be initiated. In particular, in circumstances where the licensee does not agree with the NRC staff's judgment regarding whether a violation occurred or its severity, a § 2.202 proceeding would be appropriate. That does not mean, however, that we are advocating change in the current practice -- the NRC should retain the flexibility to use the less formal and less resource intensive alternatives as circumstances dictate.

2. Should Confirmatory Action Letters be used to a greater or lesser extent than at present?

Confirmatory Action Letters are an administrative mechanism used by the NRC to supplement the enforcement process. The NRC generally uses Confirmatory Action Letters to confirm a licensee's or vendor's commitment to take certain actions to address the NRC's concerns. In recent years, however, Confirmatory Action Letters sometimes have been used by the NRC to promote licensee action not specifically required under the regulations. The use of these letters should be restricted to matters of compliance with specific NRC objective requirements.

3. Under what circumstances should a Confirmatory Action Letter be used as a substitute for an order?

See Question F.1 above.

4. Are licensees actions in response to Confirmatory Action Letters different from orders? Do licensees treat them differently?

Licensees understand that the NRC expects them to adhere to the terms of the Confirmation Action Letters. They also recognize that the NRC will take action to ensure the obligations and commitments contained in Confirmatory Action Letters are met. However, licensees try to comply with voluminous NRC regulations, whether or not they are subject to a violation, a Confirmatory Action Letter, or an order. They take such obligations seriously and respond accordingly.

G. EXERCISE OF DISCRETION

The enforcement policy in Section VII. A and B provides guidance on when to exercise discretion, and either escalate or mitigate enforcement sanctions, to ensure that the resulting enforcement action appropriately reflects the level of NRC concern, and conveys the appropriate regulatory message to the licensee.

1. Is the guidance provided for exercise of discretion adequate?

Section VII.A provides guidance on NRC use of discretion to escalate enforcement sanctions for violations categorized as Severity Level I, II, or III where the application of the normal guidance in the policy does not provide an appropriate regulatory response. Specifically, the enforcement policy permits the NRC to exercise its discretion to ensure that the proposed sanction "reflects the NRC's concern regarding the violation at issue and that it conveys the appropriate message to the licensee."

As explained in our letter of October 24, 1994, and in more detail in Attachment 1 to that letter, licensees have powerful economic and business incentives which motivate them toward compliance and safe operation. In addition, violations, regardless of their severity level, command the immediate attention of licensee management. As a result, there is no need to increase the severity of the sanction in order to "convey the appropriate regulatory message" to licensee management regarding a particular instance of noncompliance.

Even if there were a "need to send a message", the guidance provided by this section of the enforcement policy is inadequate. It is not specific; the level of the NRC's concern, and whether the "message" is "appropriate," appear to be highly subjective matters with no clear tie to plant safety. Furthermore, those responsible for the exercise of discretion frequently have not communicated directly with the licensee, and thus their assessment of the need to "send a message" has a high potential for error. Further, experience does not support the conclusion that larger penalties or other more severe action will spur licensees to more aggressively comply with NRC regulations or respond to problems. Therefore, Section VII.A should be deleted from the enforcement policy. In the alternative, it should be re-written to provide guidance on the specific safety considerations that might make its use appropriate.

The guidance provided in Section VII.B is adequate.

2. Should there be additional examples where discretion should be exercised? For example, should facilities that are recognized by the NRC to be poor performers

(sometimes referred to as plants on the "watch list" or "problem plant list") continue to be subject to civil penalties during the period of time it takes to improve their performance which normally takes some time to achieve? Should such discretion be exercised even if an average performer with the same violations would receive a civil penalty? Should the response be dependent on whether the plant is shut down or operating? Should the response be dependent on whether the licensee or the NRC identifies the violation?

The enforcement policy should be flexible enough to allow consideration of extenuating circumstances such as those described above. However, detailed guidance is not required because the particular circumstances of any potential enforcement action are so different that they can only be addressed on a case-by-case basis.

H. TIMELINESS OF ENFORCEMENT ACTIONS

The NRC attempts to issue routine escalated enforcement actions within eight weeks of identification of the potential enforcement issue. An enforcement conference is typically held within four weeks of completion of an inspection.

1. Are these timeliness guidelines for issuance of escalated enforcement actions appropriate?

The timeliness guidelines for issuance of escalated enforcement actions published in the NRC Enforcement Manual are appropriate in most circumstances. However, it is often the case that licensees are requested to attend enforcement conferences on very short notice. In some cases, an inspection report detailing the purported violation is provided only a few days in advance. This does not provide adequate time for the licensee to digest, analyze, and gather information on the purported violation, or to prepare an informative and well-organized presentation. Therefore, the inspection report should be provided at least two weeks prior to the enforcement conference.

2. Enforcement conferences are usually scheduled at the convenience of the NRC in the interest of timely enforcement actions. In scheduling enforcement conferences, should NRC schedule them at the mutual convenience of both the NRC and licensee even if it delays the enforcement action, assuming that the delays are not unreasonable?

While NRC schedules enforcement conferences at its convenience, it is generally receptive to schedule modifications if serious conflicts exist with licensee management's schedule. Such resolution of schedule conflicts should continue even if it results in slight delays in processing enforcement actions.

3. Some enforcement cases take considerably longer than the eight week goal noted above. Has such delay substantially impacted licensees? Is such delay a significant concern? Explain.

The delay in processing escalated enforcement actions beyond the eight week goal has almost exclusively occurred in the period between the enforcement conference and the issuance of the civil penalty. In some cases, the delay has been so protracted that it created the appearance of a new and separate violation. Further, when the civil penalty is delayed into the subsequent SALP period, the licensee's SALP scores are adversely affected in two SALP periods.

4. If the time to process an escalated enforcement action should be reduced, should it be done at the expense of omitting review by the Office of General Counsel, Office of Enforcement, or the appropriate program office?

Several steps could be taken to render the process more efficient and effective:

- Use of inspection follow-ups or informal management meetings with the licensee to weed out, early in the process, items not suitable for escalated enforcement action.

- Reducing the number of escalated enforcement actions by focusing only on matters that are of demonstrable safety significance.

- Presenting full information concerning the purported violations to the licensee as soon as possible so that informal meetings and subsequent enforcement conferences result in a complete exchange of information and so that protracted follow-up exchanges are not necessary.

- Early screening by regional personnel to ensure that an enforcement conference is necessary for the NRC to be able to fully and fairly evaluate the matter.

I. VIOLATIONS INVOLVING WILLFULNESS AND ACTIONS AGAINST PERSONS FOR WRONGDOING

The NRC's enforcement policy identifies willful violations to be of particular concern, and provides for escalation of the severity level of a violation based on willfulness.

1. Does the enforcement policy appropriately reflect the significance of willful violations? If not, how should the Policy be changed to better reflect the significance of willful violations?

In general, the enforcement policy appropriately conveys NRC's view of the significance of willful violations such as falsification of material certifications or submission of information known to be misleading or false. However, blanket criminalization of violations of the NRC's voluminous and complex regulations is unjust and inconsistent with a sound regulatory approach. Criminal enforcement should be reserved only for egregious violations obviously committed with malice. A disproportionate focus on individual wrongdoing creates a cloud of uncertainty as to whether an individual, carrying out responsibilities to the best of his or her ability, will later be second-guessed and charged with wrongdoing, or even a criminal offense. Because there is no evidence of an increase in the number of actual wrongdoing events, no expansion of the scope of the policy is warranted. In fact, the policy should de-emphasize the focus on the individual except in cases clearly involving malice, where proof of an intent to violate a regulation is present.

2. Is sufficient guidance provided for developing sanctions against licensees for willful violations? If not what additional guidance or criteria would be appropriate?

While an individual employee may have committed a willful violation, it is inappropriate to escalate the sanction against the licensee for willfulness unless there is evidence that the licensee encouraged the willful action or unless a responsible officer acted with malice. The current policy makes no distinction between the willfulness of the individual and the licensee. The policy should be changed.

3. Is sufficient guidance provided for developing consistent sanctions against individuals for wrongdoing? If not, what additional guidance or criteria would be appropriate?

The current guidance places undue emphasis on the NRC taking enforcement sanctions against individuals. Further, it does not distinguish between the individual who purposefully commits a violation and one who purposefully commits an act, which is later determined, after substantial argument and analysis, to have constituted a violation. Enforcement actions against individuals should be limited to those instances that clearly involve malice.

4. NRC focuses its enforcement actions on licensees. Normally the NRC when it issues sanctions to licensees' employees, contractors or other agents, also issues sanctions to licensees. Should the NRC issue enforcement actions to licensees when sanctions are also issued to their employees, contractors or other agents? If not, why not, and under what circumstances should action not be taken against licensees for the actions of others?

Licensees understand that they are responsible for the acts of their employees. Thus, licensees fully expect to receive violations when their employees act in a manner inconsistent with regulatory requirements. However, it is not the practice of licensees to condone or direct violations involving willfulness, and licensees should only be penalized beyond the underlying violation if it is clear that they have done so. Penalizing the licensee for the willful action taken by an individual that is against licensee direction and policy arbitrarily penalizes licensees who are not at fault and had no realistic opportunity to prevent the violation. In those circumstances, penalizing the licensee provides no meaningful incentive or deterrent effect.

5. Should orders be used more frequently against individuals who violate the rule on deliberate misconduct (e.g., 10 CFR 30.10, 40.10, and 50.5)? Does the potential for the use of such orders increase accountability by employees and contractors? Do employees and contractors appreciate that they may be subject to direct action by the NRC?

The undue emphasis on enforcement actions against individuals is unnecessary and, over time, is likely to chill workers from reporting errors and misjudgments for fear that they or their coworkers may face a harrowing and career-ending government investigation. Since there has been no increase in the number of instances involving wrongdoing, there appears to be little need for increased personal enforcement.

A second problem with the use of orders is that there is little protection of the individual employee from abuse. It is particularly disconcerting to individuals, and smacks of prejudgment, when orders or Demands for Information are issued without any opportunity for the individual to present his or her "side of the story" to NRC management. Further, there are essentially no due process protections provided by the current process, and the stigma of an order, even if later rescinded, is likely to ruin an otherwise promising career.

Taking actions directly against individuals, in the absence of malice, does nothing to improve the sense of accountability by individuals. The continued use of such a process may adversely affect public health and safety by encouraging responsible, conscientious employees to seek a career outside the nuclear industry. As a result, actions should be taken against individuals only in egregious situations.

6. Should the NRC use civil penalties against individual wrongdoers who violate regulations such as 10 CFR 30.10 and 10 CFR 50.5 in lieu of orders which impact the employees' livelihood?

While the option to use civil penalties against wrongdoers should remain, the NRC should de-emphasize their use consistent with the discussion above. The imposition of civil penalties or issuance of orders against an individual both have very serious impact on the individual and should only be used in the rarest of circumstances.

7. A Letter of Reprimand is used to notify an individual of a violation when a formal sanction is not warranted. Should a Letter of Reprimand be used rather than a more formal action such as a Notice of Violation or an order where the individual has willfully violated a requirement? If so, under what circumstances? For example, should it be used in cases where a relatively low level employee has been fired as a result of the violation and the employee appears to be candid and remorseful.

Wherever possible, the staff should use informal techniques before resorting to more formal enforcement sanctions. Over time, a disproportionate focus on formal methods will likely have a chilling effect on employee willingness to report personnel errors. NRC sanctions against individuals should only be used in egregious cases. A Letter Of Reprimand is likely to be more effective to motivate a positive reaction by both the individual and the licensee than a more formal sanction such as a Notice of Violation or an order.

8. If a criminal sanction is issued against an employee or agent of a licensee who caused the violation, should civil sanctions be issued against the licensee who is licensed by the NRC for the activity?

See the response to question I.2 above.

9. The enforcement policy also states that civil penalties are considered for all willful violations. However, to encourage licensees to identify willful violations and to take strong remedial actions to demonstrate the seriousness of such violations to other employees and contractors thereby creating a deterrent effect, discretion may be exercised for certain willful violations at Severity Level IV or V. Is this consistent with the seriousness of willful violations and should this policy be continued? Should it be expanded to other severity levels?

The policy provides incentives for licensees to take appropriate action. It should be continued and expanded to all severity levels. The principle is the same, regardless of severity level. See also question I.3 above.

K. EXERCISE OF ENFORCEMENT DISCRETION FOR OPERATING REACTORS

The NRC requires that a licensee operate its facility in compliance with the NRC's regulations and the specific facility's license. When a licensee fails to comply with the conditions of its license or the NRC's regulations, the staff normally takes enforcement action against that licensee in accordance with the NRC enforcement policy. Section VII.C of the enforcement policy, 10 CFR part 2, Appendix C, recognizes that on occasion circumstances may arise where a power reactor licensee's compliance with a technical specification limiting condition for operation or with other license conditions would involve an unnecessary plant transient or performance of testing, inspection, or system realignment that is inappropriate with the specific plant conditions, or unnecessary delays in start up without any corresponding health and safety benefits. In these circumstances it may be appropriate not to enforce the applicable requirements provided that the NRC is clearly satisfied that the action is consistent with protecting the public health and safety. Before issuing a NOED to a licensee, the licensee must justify the safety basis for the request and provide whatever information NRC deems necessary in making a decision as to whether to exercise this discretion. NOEDs are infrequently used and when issued are placed in the NRC Public Document Room. The use of enforcement discretion does not change the fact that a violation of a license requirement occurred. Under the enforcement policy, the NRC staff is to take enforcement action when it determines that there is an underlying violation that caused the need to seek the issuance of the NOED.

1. Under what circumstances should this type of enforcement discretion be exercised and why?

Even the NRC's time-tested regulations, technical specifications and license conditions cannot contemplate every possible reactor plant configuration or condition. In those rare cases where strict compliance with a formal requirement may have a negative impact on safety for a given plant condition, the exercise of enforcement discretion is clearly in the public interest. Notices of Enforcement Discretion (NOEDs) are frequently issued to avoid unnecessary plant transients.

NEI believes that the exercise of such discretion is fully consistent with and, in fact, promotes fulfillment of the NRC's statutory mandate. The NRC's authority to exercise such discretion is inherent in the authority to enforce its regulations. Notice of Enforcement Discretion Review Team Report, September 12, 1994.

The report of NRC's Review Team on NOEDs supports the current NRC practice. The Team concluded that the program had been well implemented and cited no abuses of the program by either licensees or the NRC. The industry agrees with the conclusions of the Review Team and, in general, with its recommendations. Discussion of specific issues raised in that report follows.

Applicability to Rules and Regulations

The Review Team indicated that additional clarification was necessary on the applicability of the policy to regulatory requirements contained in NRC's rules as contrasted to requirements contained in technical specifications or license conditions. The industry believes the applicability to requirements contained in the rules and regulations is already clear. The NRC's authority to exercise enforcement discretion for noncompliances with a regulation is no different than its authority to exercise enforcement discretion for noncompliances with a technical specification. An NOED granted for a regulation noncompliance, like an NOED for a technical specification noncompliance, would simply document the NRC's intention not to take enforcement action for the impending noncompliance. By its nature, an NOED is temporary and would not change the applicability of the underlying requirement to the licensee. Noncompliances must still be corrected in a timely fashion by the licensee. See e.g., 10 C.F.R. Part 50, Appendix B, Criterion XVI; see also 10 C.F.R. § 20.201. Should the licensee require long-term or permanent relief on the matter, an NOED could be followed by a formal exemption request filed pursuant to 10 C.F.R. § 50.12.

However, we disagree with the NRC Review Team's recommendation that NOEDs only be used for regulations whose requirements are also found in technical specifications. No evidence has been provided that supports such a narrow interpretation of the legal basis for the use of NOEDs. As more technical specification requirements are eliminated through technical specification improvement efforts, such a limitation could artificially prevent the NRC staff from exercising appropriate enforcement discretion for those requirements removed from technical specifications. This would be an anomalous result.

While we encourage the NRC to formally recognize its authority to use appropriate enforcement discretion in the implementation of its regulations, the NRC should not unnecessarily, and without a legal basis to do so, limit itself with a "bright line" test for when an NOED might be appropriate. The real issue in any exercise of enforcement discretion is whether, in operating with a noncompliance (either from a regulation or a technical specification), the standard of reasonable assurance of public health and safety is met.

Consideration of Safety Beyond Radiological Concerns

In the vast majority of cases, the NRC confines the issues considered to those impacting radiological safety. However, experience demonstrates that in unusual circumstances, the overall safety benefit to the public provided by continued reactor operation has been appropriately considered. During unusual natural events such as severe climactic conditions resulting in exceptional power demand or power instability, continued reactor operation may save human lives. The exercise of this discretion is consistent with the NRC's statutory authority and has served the public well. The enforcement policy should explicitly permit the exercise of enforcement discretion under these unusual circumstances.

Standards for Startup Plant Requests

NRC policy currently permits, with certain limitations, NOEDs to support plant startup and continued operation. This policy is sound and should be continued.

In the vast majority of requests for the NRC to exercise appropriate enforcement discretion, licensees have demonstrated a net safety gain to be realized through issuance of a NOED. In some cases, an equivalent level of safety has been properly approved as a basis for the exercise of enforcement discretion. Equivalent safety margin is explicitly addressed in the enforcement policy both for operating and shutdown plants.

However, in practice the staff rarely has exercised its discretion for safety equivalent alternatives that have been requested to restart plants after an outage. We believe staff should exercise its safety discretion for safety equivalent alternatives including those occurring in reactor startup situations. Safety alternatives suggested based on equivalent safety margins free licensee resources for accomplishing safety enhancements and other improvements. Also, there is a clear benefit to the public and ratepayers in the form of electrical power. If there is no adverse safety impact, the NRC should consider these interests in determining that enforcement discretion is appropriate and no distinction should be made between startup and continued operation.

Requests for enforcement discretion involving reactor startups rarely involve startup from cold shutdown conditions. In most such requests, the licensee has already begun the lo ıg and complex process of plant heat-up after maintenance. In making the transitio ›etween operational modes, plant technical specifications call for various tests and sur illances. Because of maintenance and other considerations, some tests and surveillance may not be appropriate. Plant systems may be in configurations different than those contemplated by the technical specifications. To stop or delay a heat-up or startup to satisfy those requirements may introduce additional radiological risk

without any offsetting safety benefit. In these cases, the exercise of enforcement discretion to allow continued plant heat-up and startup is entirely appropriate and consistent with the enforcement policy. The conditions on the exercise of discretion should be expanded in practice to also permit continued plant heat-up and startup where equivalent safety margin is clearly demonstrated. Under these circumstances, the public receives the benefits or reactor operation and licensee resources are made available for safety and other improvements.

The Review Team recommended that the circumstances considered in the case of requests for enforcement discretion for plants in the startup sequence should include hardware and equipment available but previously not accounted for to provide equivalent safety margin. The industry agrees with this recommendation. However, we do not believe that a change to the enforcement policy is necessary. The current policy does not limit factors considered by the staff. Further, we believe that the consideration of compensatory measures should not be limited to physical systems and equipment. Compensatory measures should include consideration of operator actions and other measures not primarily evaluated but now pertinent. The Review Team, while acknowledging that other compensatory measures would be equally appropriate, did not recommend their consideration because of a concern that the policy would be broadly expanded. The industry does not agree that the consideration of additional compensatory measures would inappropriately expand the scope of the policy. The industry believes that the NRC could well manage the issuance of NOEDs for plant startups, taking into consideration a broader scope of compensatory measures without losing control of the process.

We note that the enforcement policy does not state that the criteria applied to startup plants establish a higher standard than for operating reactors. The policy and the enforcement manual both indicate that the licensee must demonstrate equivalent or greater safety margin, not just "greater." Therefore, the NRC concludes that there is reasonable assurance that the public health and safety will be protected despite the noncompliance, the NRC can and should issue an NOED regardless of the mode of operation.