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NOTE TO: Norman C. Moseley, Director, ROI
James H. Sniezek, Director, FFMSI
Boyce H. Grier, Director, RI
James P. O'Reilly, Director, RII
Robert H. Engelken, Director, RI

REVISED ENFORCEMENT PROGRAM TASK FORCE

Over the past few weeks of budget preparation and hearings, the Acting Director has had occasion to discuss, among other matters, our enforcement program with individual Commissioners and Congressional staff members. Two messages have come from these discussions:

1. Technical decisions arising from our inspection program, especially those involving enforcement matters, are recognized as sound. However, we seem to have difficulty articulating our positions in a way that laymen can understand.

2. Our enforcement program is fundamentally well-conceived and effective, but relies too heavily on informal techniques, e.g., IAL's, Bulletins and Circulars are good tools with shaky authority. It should "look tougher."

XOOS has been asked to establish a task force to reassess our entire enforcement program from the point of view of authorities we would seek if we were to "start from scratch." This effort is distinct from the current MC 0800 revision effort. Certain ground rules would apply:

1. All our present sanctions, from NOV's through orders and including the informal tools, as well, would be available. Others may be considered. All sanctions should have some regulatory authority. The task force should identify appropriate vehicles for those authorities: law, rules, etc.

2. Our present elevated enforcement sanctions, or others of comparable severity, would continue to require action at the Office Director level; e.g., no CP's from RD's.

I would like to have your thoughts on this subject, and if your workload permits, identification of a member of your staff to serve on the task force. We would prefer to have an experienced inspector or Section Chief from the regions, rather than the Enforcement Coordinators, in order to avoid any possible built-in biases. The same general "avoidance" criterion would apply to Division representatives. XOOS will provide a representative, but will not chair the task force. I expect the total combined resources needed should be on the order of 200 man-hours. One or two one-day meetings will probably be required, with the balance of the effort performed individually by participants.

Until such time as we establish the task force formally (before the end of March) I would appreciate your comments by telephone. When we have identified appropriate membership, I will issue an appointing memorandum, with a charter for the group.

Original signed by
D. Thompson

Dudley Thompson
Executive Officer for
Operations Support, IE

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

March 8, 1979

John Davis FE
TR 3/12

MEMORANDUM FOR: Commissioner Kennedy

FROM: Carlton R. Stoiber
Assistant General Counsel

SUBJECT: RESPONSE TO YOUR QUESTIONS ABOUT THE REVISED CIVIL PENALTIES PROPOSAL

In your memorandum of March 6, 1978 you asked several questions about the civil penalties proposal and noted your agreement with the Chairman's concerns. We would note in general that the proposed change to an administrative imposition system does not deprive penalized persons recourse to independent judicial review. Both the Commission's determination that a violation has occurred and the Commission's choice of an appropriate penalty would be reviewable before a court of appeals. If the amount of the fine was not reasonably related to the violations established, the court could set it aside. This is essentially review for abuse of discretion (see answer to question 3, below), which is not different from the standard a district court judge would apply under the present de novo review provisions. The agency's expert judgment regarding the seriousness of the violation would be given considerable deference, which seems entirely appropriate. Thus the only real change in standard of review applies to the Commission's factual determinations, which the court of appeals would uphold if supported by substantial evidence in the record as a whole. Under present de novo review in the district court, the court would find the facts for itself after an evidentiary hearing. We do not view this change as one which significantly deprives violators of protection against arbitrary Commission action.

Response to questions:

1. How many times in the past was the maximum fine asked for by the Staff? How often granted by the Commission?

The staff informs us that eight penalties in excess of $25,000 (the maximum for violations within a 30-day period

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under the present statute) have been proposed. The penalty imposed was reduced slightly in three of those cases. It is not immediately apparent from the available data whether these proposed penalties were the maximum authorized by the statute.

2. Why did Congress originally provide for de novo review in the District Court? Does the removal of the penalty ceiling and the increase in the maximum penalty make such de novo review more or less desirable now?

Regarding the source of the present de novo review provisions, I am attaching an early OGC memo on this subject which discussed the legislative history. It has been our view that an increase in penalties makes an administrative imposition system more rather than less desirable, because the Commission is more likely to have to resort to collections actions to maintain the deterrent effect of its civil penalties program. This means that the problems with the present system, as discussed in our draft legislative proposal to Congress, will become more of an interference with the effectiveness of civil penalties.

3. Is the "substantial evidence" standard of review applicable to the finding on the amount of penalty, as well as the factual determination? Or is the standard "abuse of discretion"?

The nature of the "substantial evidence" standard for judicial review makes it primarily applicable to an agency's factual determinations. Once the agency has found as a fact that a violation occurred, the agency's choice of a suitable fine is an act of discretion and is reviewable for abuse of discretion. Courts have uniformly held that an agency has great latitude in choosing the proper sanction from among statutory alternatives. The Supreme Court has noted that "the relation of remedy to policy is peculiarly a matter for administrative competence." Butz v. Glover Livestock Commission Co., 411 U.S. 182, 185 (1973). The Court quoted with approval a court of appeals holding that "so long as the remedy selected does not exceed the agency's statutory power to impose and it bears a reasonable relation to the practice sought to be eliminated, a reviewing court may not interfere." 454 F.2d 109, 114. This "reasonable relation" standard of review would appear to be as applicable to a district court review of a proposed penalty, once the fact of the violation had been established, as to a court of appeals review under an administrative imposition system.

4. Are more specific statutory guidelines as to the appropriate amount of the fine (e.g., past history of violations, severity of violation, or size of licensee) desirable or necessary?

NRC presently provides its own guidelines for administering the civil penalty program. Since the Commission might well find that changing circumstances, perceptions of risk, etc., would call for a change of guidelines, it seems desirable that the statute not restrict flexibility to make such changes.

5. Could you specify in what sense the civil penalty proceeding is "equivalent" to the other named proceedings in section 234(c)?

The purpose of the "equivalence" language in Section 234(c) is to make clear that the Commission may employe the authority in Section 191 of the Atomic Energy Act to delegate to a licensing board the job of conducting hearings on proposed civil penalties and making initial decisions, followed by administrative review procedures equivalent to those employed in licensing decisions.

6. Is not the proposed addition in section 234(b)(3) fully and more appropriately covered by section 234(e)?

No. The addition to 234(b)(3) states that the notice to a person subject to a penalty shall in effect contain a warning that no judicial review will be available at the collection action. Thus persons who may choose not to take advantage of the proffered agency hearing will be on notice that they have no other opportunity for review. This notice requirement is an addition not contained in 234(e).

7. Should there be limitations as to the District in which a civil action may be brought?

Under 28 U.S.C. 1355 the district courts have original jurisdiction of any action for the recovery of a fine incurred under an Act of Congress. Under 28 U.S.C. 1395 this proceeding "may be prosecuted in the district where it accrues or the defendant is found." We see no need to make civil penalties collection actions an exception to this established statutory pattern.

8. Should section 234(c) specify who may request a hearing?

This may depend on whether the Commission wishes to afford hearings only to the person subject to the penalty or wants to leave open the possibility that persons arguably affected by the size or adequacy of the penalty (e.g., ratepayers, citizens concerned about prospective regulatory non-compliance at a nearby facility) should be allowed to intervene in a civil penalty proceeding, even though the violator may be willing to pay up without a fight. Leaving the language as it is affords the Commission an opportunity to interpret the statute flexibly regarding possible requests for hearings by persons other than the violator but also leaves the door ajar to nuisance requests. The simplest door-closing change would be: "The Commission shall afford to the person notified pursuant to subsection (b) an opportunity for hearing ..." etc.

Re comment on the first full sentence on page 10 --

--Our present civil penalties statute, Section 234, does not provide a right to an agency hearing.

Attachment: Excerpts OGC 6/15/76 memo

cc: Chairman Hendrie
Commissioner Gilinsky
Commissioner Bradford
Commissioner Ahearne
L. V. Gossick, EDO
C. Kammerer, OCA
A. Kenneke, Acting Dir., OPE
S. J. Chilk, SECY
J. Fouchard, Dir., OPA
J. Davis, Acting Dir., I&E

ATTACHMENT

EXCERPTS FROM AN OGC MEMO OF June 15, 1976 DISCUSSING THE HISTORY OF THE PRESENT DE NOVO REVIEW PROVISIONS:

.. The language of 234(c) is the same as that proposed by the AEC, which stressed at the hearings (Hearings before the Joint Committee on Atomic Energy, 91st Congress, 1st Sess., on AEC Omnibus Legislation, Sept. 12, 1969, hereinafter "Hearings") that "civil action would be instituted by the Department of Justice in Federal district court where the right to a full hearing on the merits of the charges would exist." Remarks of AEC General Counsel Joseph Hennessey, Hearings at 29. Hennessey observed that the AEC had considered the approach of having the entire civil proceeding before the agency, with judicial review in the Court of Appeals but had rejected this approach on the (apparently mistaken) belief that judicial trial de novo was necessary in a "penalty" action. Hennessey stressed that although the proposed legislation did not require an agency hearing, nevertheless the AEC intended to provide in its regulations an opportunity for a full administrative hearing in addition to the statutory right to de novo judicial review. In a letter to the JCAE, Hennessey observed that the proposed legislation was based on the civil penalty provisions in the Federal Communications Act and the Federal Aviation Act, which do not require agency hearings because "an alleged violator's guarantee of hearing is provided in Federal district courts." Hearings at 38.

The Senate report accompanying the amendments (Senate Report No. 91-553, 91st Congress, 1st Sess., Amendments to the Atomic Energy Act of 1954, as amended, Nov. 24, 1969) is silent on the scope of the district court collection action but otherwise echoes the agency position at the hearings. The report states: "Substantially the same remedial authority has been conferred by statute upon other regulatory agencies, such as the Federal Communications Commission, the Federal Aviation Agency, and the Federal Trade Commission." Id. at 9. The report notes that the AEC had assured the Joint Committee that a full administrative hearing would be made available. It is not entirely clear why, if Congress thought that the availability of this hearing was important, a requirement was not explicitly included in Sec. 234. As it is, the primary procedural safeguard "specifically spelled out" in the legislation is the alleged violator's right to make a written response. Congress may have shared with Hennessey the notion that a civil penalty could not be imposed without a de novo judicial action and was therefore reluctant to make mandatory at the agency level an additional full-scale proceeding.