

February 1, 2021

Annette Vietti-Cook  
Secretary  
U.S. Nuclear Regulatory Commission  
Washington, DC 20555-0001

ATTN: Rulemakings and Adjudication Staff

Subject: Proposed Policy Statement Revision, Docket ID NRC–2020–0261

Dear Ms. Vietti-Cook:

Enercon Talisman is submitting the comments contained in the attachment in response to the subject notice. We appreciate this opportunity to provide comments related to this proposed revision to the NRC’s Enforcement Policy.

In general, we consider most of the changes to be beneficial, particularly a number of those associated with materials licensees (e.g., gradation in treatment of loss of control/surveillance over portable gauges). Notwithstanding this general impression, we offer the attached comments for your consideration.

Sincerely,



Thomas E. Magette, P.E.  
Director, Talisman Division  
Enercon Services, Inc.

Attachment

## Comments on Propose Changes to NRC Enforcement Policy

### 1. Content of Change Related to Comment

Regarding the change to Section 2.2.4 in that “related” violations may result in the issuance of both a Reactor Oversight Process (ROP) finding and a traditional enforcement violation, which reads as follows:

*“Certain violations at power reactors cannot be addressed solely through the SDP and are therefore assigned severity levels and can be considered for civil penalties in accordance with this Policy. Violations with the following attributes are dispositioned using traditional enforcement:*

- a. violations that resulted in actual safety or security consequences (as described in Section 2.2.1.a)*
- b. violations that may impact the ability of the NRC to perform its regulatory oversight function (as described in 2.2.1.c)*
- c. violations involving willfulness (as described in Section 2.2.1.d)*
- d. violations not associated with ROP or cROP inspection findings*

*In determining the severity level assigned to such violations, the NRC will consider information in this Policy and the violation examples in Section 6.0 of this Policy, as well as SDP-related information, when available. Related [footnoted] violations may be dispositioned in parallel within both the traditional and ROP/cROP process. The SDP will inform but may not necessarily determine the severity level, while the severity level or civil penalty amount should not influence the SDP.”*

The related footnote states: *“In this context, the term ‘related’ refers to violations that have a cause and effect relationship or directly related to the same event. For example, a willful failure to adequately perform a quality-related work order (dispositioned using traditional enforcement) that results in an inoperable structure, system or component (dispositioned using ROP or cROP).”*

**Comment.** When the ROP was created, there was deliberate consideration given to differentiating between whether an issue should be dispositioned through the SDP or traditional enforcement process. The intent, which was a fundamental concept, was to not double count the particular issue in terms of licensee accountability and NRC oversight. The thought process was that a licensee should not be penalized with both a white or greater colored finding (which causes movement to the right in the ROP Action Matrix and the increased regulatory oversight which results) and a potential escalated enforcement action (i.e., Severity Level I, II, or III violation with a potential civil penalty).

The example provided in the footnote gives context to what constitutes a related violation, nonetheless, we believe there could be broad interpretation applied in reaching a conclusion that a violation is related to an issue that is subject to the SDP. Despite the statement in the policy that, “The SDP will inform but may not necessarily determine the severity level, while the severity level or civil penalty amount should not influence the SDP,” we believe the Office of Enforcement through its program oversight function will be hard-pressed to ensure consistent application across the Regions.

**Proposed Resolution.** In keeping with the fundamental premises upon which the ROP was based, and to avoid challenges by the NRC program and regional offices in ensuring consistent and predictable outcomes, we believe an issue should not be dispositioned by applying the SDP and traditional enforcement in parallel as contemplated. Rather, the issue should be dispositioned via one of the two processes, i.e., either the SDP or traditional enforcement.

In the example provided with respect to related violations, i.e., a willful failure to adequately perform a quality-related work order that results in an inoperable structure, system or component, the most appropriate disposition would be for the NRC to issue an escalated enforcement action based on the willful aspect of the violation and its associated safety significance since the deliberate action resulted in an inoperable structure, system, or component. If the violation did not involve a willful aspect, then the violation should be dispositioned via the SDP and an appropriately colored finding issued by the NRC based on the associated significance determination result.

## 2. Content of Change Related to Comment

Regarding issues of “potential safety or security consequence” the new definitions are provided as follows:

- *Substantial Potential Consequences – a realistic likelihood of exceeding a regulatory limit, the likelihood typically demonstrated by concrete, tangible outcomes that do not exceed regulatory limits, but are definable and the circumstances are only fortuitous that the limit was not exceeded. The concern is not whether the relative limit was exceeded, but whether the licensee provided adequate controls over the situation, as required, to prevent exceeding the limit.*
- *Potential Consequences – a realistic likelihood of safety or security consequences, typically demonstrated in scenarios where most, or all barriers to a safety or security consequence are removed; however only a limited tangible outcome was possible.*
- *Low or Relatively Inappreciable Consequences – credible scenarios where safety or security consequences could occur, however, at least one definable barrier, with a low likelihood of failure, remained as a defense-in-depth strategy.*

**Comment.** We believe the NRC will find it particularly difficult to ensure uniform application of this expanded definition of “Potential Safety or Security Consequences” to ensure consistent application across the Regions. In addition, the continued use of undefined and subjective terms such as “realistic likelihood” and “credible scenarios” does little to provide clarity or promote consistent application across the Regions.

## 3. Content of Change Related to Comment

Regarding the added SL II Violation example in 6.7.B.7, which reads in part:

*“ . . . , circumstances of loss, and recovery are known.”*

**Comment.** We believe the correct wording and punctuation for this phrase should be “ . . . , circumstances of loss and recovery, are known.”

#### 4. Content of Change Related to Comment

Regarding the text added on page 22 clarifying that “identified by the licensee” includes a contractor for the licensee or third-party audits initiated by the licensee.

**Comment.** We believe that similar clarification should be added to the discussions on page 25 related to licensee corrective actions. For consistency the corrective actions taken/or not taken by contractors or third parties should also be considered.

#### 5. Content of Change Related to Comment

Regarding the text added on page 41, which reads:

*Apparent violations involving allegeders who are found to have engaged in deliberate misconduct will be processed through the normal enforcement process. However, an allegeder would typically be issued an appropriate enforcement sanction (e.g., NOV or order) only if: (1) the allegeder is a licensee official (as defined in Section 7.0, “Glossary”); (2) escalated enforcement due to the allegeder’s actions appears to be warranted for the licensee; and (3) the allegeder continues to be employed within the NRC’s jurisdiction (either at the original or different licensee) or has the potential to be employed within the NRC’s jurisdiction in the future. Clear, significant escalation and mitigation factors may be considered in determining an appropriate sanction and will be documented in the final enforcement decision. An example of an escalation factor is the allegeder directing others to engage in deliberate misconduct. An example of a mitigation factor is the allegeder being a lower level licensee official who was directed by a senior licensee official to engage in deliberate misconduct. The presence of one or more significant mitigation factors may result in a reduction of the allegeder’s enforcement sanction or use of discretion to not issue any enforcement sanction (e.g., if an enforcement action is taken against a more senior licensee official who directed the inappropriate action).*

**Comments.** The term “allegeder” is not defined in the enforcement policy or in the allegation program. The term most often used in the allegation program is “Concerned Individual.” To prevent confusion and misapplication, NRC should define and use a common term in both the enforcement and allegation programs.

We propose that the discussion be modified to include context from the allegation program in order to continue to encourage concerned individuals to bring forward allegations of misconduct. The current added text leaves the reader with the impression that allegeders are routinely processed through the normal enforcement process, subject only to very specific limited exceptions.