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PDR



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

December 1, 1999

MEMORANDUM TO: R. W. Borchardt, Director  
Office of Enforcement

FROM: Geoffrey D. Cant, *Geoffrey D. Cant*  
Enforcement Specialist  
Office of Enforcement

SUBJECT: SUMMARY OF SEPTEMBER 3, 1999 PUBLIC MEETING WITH  
UCS REGARDING ENFORCEMENT IN EMPLOYEE  
PROTECTION CASES

MEETING PURPOSE: To discuss enforcement program and practices in employee  
discrimination cases.

BACKGROUND: The meeting was scheduled in response to letters of June 18,  
1999 and June 30, 1999, from David Lochbaum, Union of  
Concerned Scientists, to Dr. Malcolm Knapp, DEDMRS. In the  
letters Mr. Lochbaum criticized the NRC's handling of employee  
protection cases and requested a public meeting with public  
interest groups to discuss the NRC's obligations and actions in  
employee protection cases.

SUMMARY OF MEETING: The meeting was announced in a Public Meeting Announcement  
(Attachment 1). The discussion was conducted in accordance  
with the agenda (Attachment 2). Those attending are listed in  
Attachment 3. Attachments 4 through 6 are handouts provided by  
the NRC during the discussion.

CONCLUSIONS: Mr. Lochbaum agreed that the Enforcement Policy does not need  
changing, but asked for more consistent enforcement application.  
Dr. Knapp stated that the agency is looking at the issue of  
consistency of actions and, as a result of this meeting, will strive  
to make the agency's actions more transparent, noting that the  
NRC desires to increase public confidence in the agency. He also  
stated that the NRC will look at the 2.206 petition filed in 1996 by  
Citizens' Awareness Network and provide information as to the  
status of work on it. Subsequent to the meeting, it has been  
learned that a decision on the petition is expected in February  
2000. This will be communicated to Mr. Gunter, who raised the  
issue, by the petition manager.

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Attachments: As stated

cc:  
PHolahan, NMSS  
REaton, NRR  
PDR

Mail 8-19-99 OE

Attachment 1

NRC FORM 549 (9-94) NRCMD 3.5		U.S. NUCLEAR REGULATORY COMMISSION		MEETING <input checked="" type="checkbox"/> NEW <input type="checkbox"/> REVISED		MEETING NOTICE NUMBER (FOIA/LPDR BRANCH WILL COMPLETE) 1999-0100	
<b>PUBLIC MEETING ANNOUNCEMENT DATA INPUT</b> (Fields with shaded headings are mandatory)							
<b>NRC MEETING CONTACT</b>							
<b>NAME</b>				<b>COMMERCIAL TELEPHONE</b> (Include Area Code)		<b>FACSIMILE TELEPHONE</b> (Include Area Code)	
Geoffrey Cant				(301) 415 - 3283		(301) 415 - 3431	
<b>MEETING DATE(S) AND TIME(S) (up to three entries)</b>							
<b>MEETING DATE(S) (Use MM/DD/YY format)</b>				<b>MEETING TIME(S) (Circle a.m. or p.m.)</b>			
<b>FROM</b>		<b>TO</b>		<b>BEGINNING</b>		<b>ENDING</b>	
9/3/99		9/3/99		9:30 <input checked="" type="checkbox"/> a.m. <input type="checkbox"/> p.m.		11:30 <input checked="" type="checkbox"/> a.m. <input type="checkbox"/> p.m.	
				<input type="checkbox"/> a.m. <input type="checkbox"/> p.m.		<input type="checkbox"/> a.m. <input type="checkbox"/> p.m.	
				<input type="checkbox"/> a.m. <input type="checkbox"/> p.m.		<input type="checkbox"/> a.m. <input type="checkbox"/> p.m.	
<b>MEETING LOCATION</b>							
<b>BUILDING</b> OWFN				<b>STREET ADDRESS</b> 11555 Rockville Pike			
<b>ROOM NUMBER</b> 0-6B11				<b>CITY AND STATE</b> Rockville, MD 20852			
<b>PURPOSE OF MEETING (96 characters available)</b>							
NRC to discuss enforcement program and practices in employee protection cases.							
<b>COMMENTS (96 characters available)</b>							<b>MEETING (CHECK ONE)</b>
RE: Letters of 6/28/99 and 6/30/99 from D. Lochbaum, UCS, to Malcolm R. Knapp, USNRC							<input checked="" type="checkbox"/> PUBLIC <input type="checkbox"/> NON-PUBLIC
<b>DOCKET OR PROJECT NUMBER</b>		and/or		<b>FACILITY NAME</b>			
<b>ORGANIZATIONS IN ATTENDANCE</b>							
<b>NRC OFFICES/REGIONS</b> (Offices only - DO NOT use Divisions, Branches, etc.)				<b>OUTSIDE PARTICIPANTS</b> (Company/Licensee/Agency Names - avoid abbreviations)			
OEDO				David A. Lochbaum, Union of Concerned Scientists			
OE							
OI							
OGC							
<b>APPROVAL -- (Required for fewer than 10 calendar days advance notice)</b>							
SIGNATURE -- BRANCH CHIEF						DATE	
RETURN THIS FORM TO: MEETING NOTICE COORDINATOR, MAIL STOP T-6 D8 FACSIMILE (301) 415-5130, TELEPHONE (301) 415-7092, E-MAIL: PMNS							

## **Agenda for Public Meeting**

September 3, 1999

1. Introduction: Dr. Mal Knapp
  
2. Opening comments: Mr. Lochbaum
  
3. Handling of employee protection cases:
  - NRC Policy - Stanley A. Rothstein
  - Procedure for developing enforcement actions - Geoffrey D. Cant
  
4. Status of petition for rulemaking: Dr. Patricia Holahan
  
5. Open discussion and public input.

## MEETING ATTENDEES

SUBJECT UCS letters DATE Sept. 3, 1999

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Name Michael Stein Organization USNRC/OE  
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Address \_\_\_\_\_

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Name James Riccio  
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Organization Public Citizen  
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WASHINGTON, DC 20003

Name Paul Gunter  
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Organization NIRS  
Address 1424 16<sup>th</sup> St #404  
Washington DC 20036

Name Bill Borchardt  
Phone No. (301) 415-2741

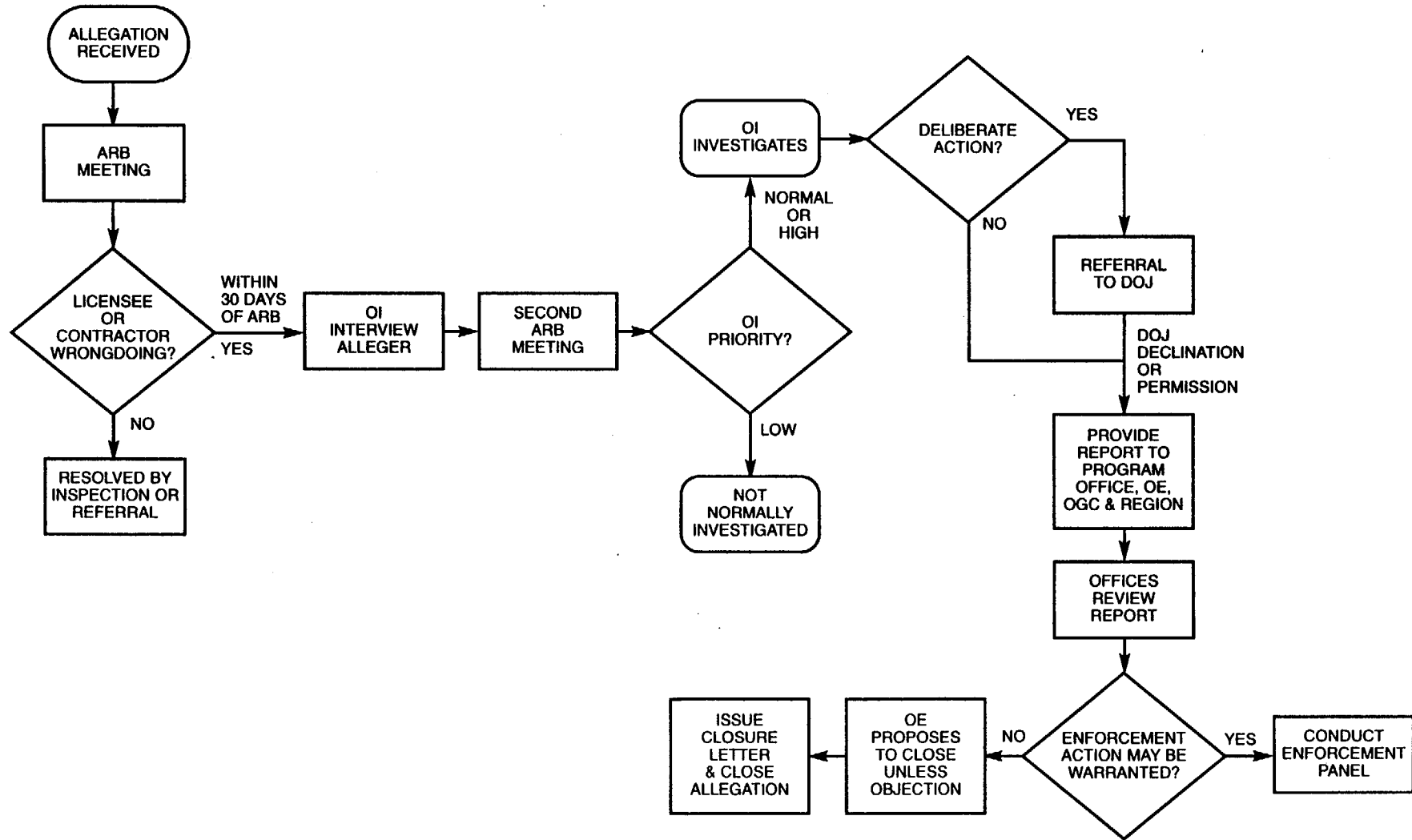
Organization OE  
Address \_\_\_\_\_

Name \_\_\_\_\_  
Phone No. ( )

Organization \_\_\_\_\_  
Address \_\_\_\_\_

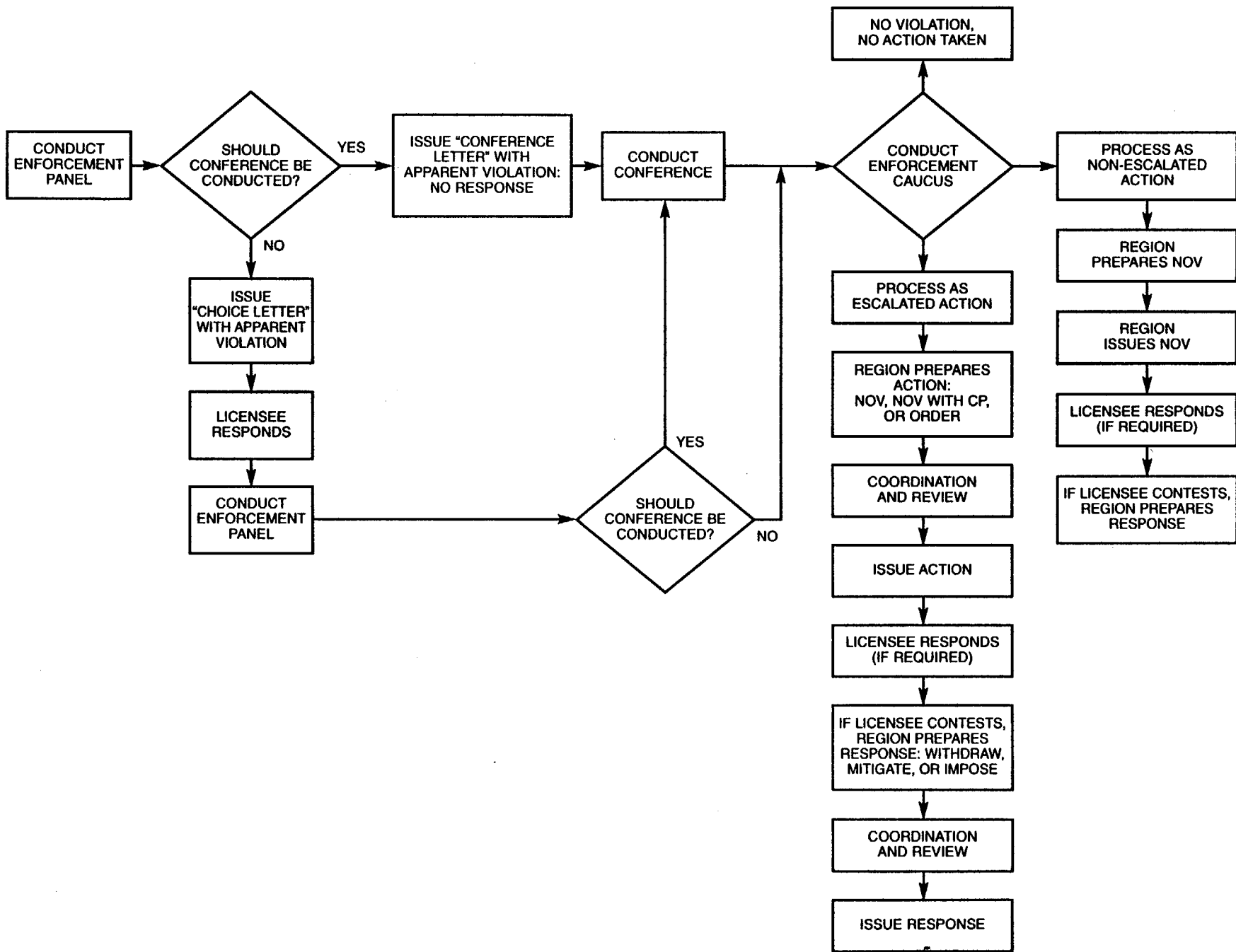


# NRC SCREENING PROCESS FOR HARASSMENT AND INTIMIDATION ISSUES



Attachment 4

# NRC ENFORCEMENT PROCESS



Attachment 5

for violations resulting from matters not within a licensee's control, such as equipment failures that were not avoidable by reasonable licensee quality assurance measures or management controls. Generally, however, licensees are held responsible for the acts of their employees and contractors. Accordingly, this policy should not be construed to excuse personnel or contractor errors.

### C. Exercise of Discretion for an Operating Facility

On occasion, circumstances may arise where a licensee's compliance with a Technical Specification (TS) 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 plant startup without a corresponding health and safety benefit. In these circumstances, the NRC staff may choose not to enforce the applicable TS or other license condition. This enforcement discretion, designated as a Notice of Enforcement Discretion (NOED), will only be exercised if the NRC staff is clearly satisfied that the action is consistent with protecting the public health and safety. A licensee seeking the issuance of a NOED must provide a written justification, or in circumstances where good cause is shown, oral justification followed as soon as possible by written justification, which documents the safety basis for the request and provides whatever other information the NRC staff deems necessary in making a decision on whether or not to issue a NOED.

The appropriate Regional Administrator, or his or her designee, may issue a NOED where the noncompliance is temporary and nonrecurring when an amendment is not practical. The Director, Office of Nuclear Reactor Regulation, or his or her designee, may issue a NOED if the expected noncompliance will occur during the brief period of time it requires the NRC staff to process an emergency or exigent license amendment under the provisions of 10 CFR 50.91(a)(5) or (6). The person exercising enforcement discretion will document the decision.

For an operating plant, this exercise of enforcement discretion is intended to minimize the potential safety consequences of unnecessary plant transients with the accompanying operational risks and impacts or to eliminate testing, inspection, or system realignment which is inappropriate for

the particular plant conditions. For plants in a shutdown condition, exercising enforcement discretion is intended to reduce shutdown risk by, again, avoiding testing, inspection or system realignment which is inappropriate for the particular plant conditions, in that, it does not provide a safety benefit or may, in fact, be detrimental to safety in the particular plant condition. Exercising enforcement discretion for plants attempting to startup is less likely than exercising it for an operating plant, as simply delaying startup does not usually leave the plant in a condition in which it could experience undesirable transients. In such cases, the Commission would expect that discretion would be exercised with respect to equipment or systems only when it has at least concluded that, notwithstanding the conditions of the license: (1) The equipment or system does not perform a safety function in the mode in which operation is to occur; (2) the safety function performed by the equipment or system is of only marginal safety benefit, provided remaining in the current mode increases the likelihood of an unnecessary plant transient; or (3) the TS or other license condition requires a test, inspection or system realignment that is inappropriate for the particular plant conditions, in that it does not provide a safety benefit, or may, in fact, be detrimental to safety in the particular plant condition.

The decision to exercise enforcement discretion does not change the fact that a violation will occur nor does it imply that enforcement discretion is being exercised for any violation that may have led to the violation at issue. In each case where the NRC staff has chosen to issue a NOED, enforcement action will normally be taken for the root causes, to the extent violations were involved, that led to the noncompliance for which enforcement discretion was used. The enforcement action is intended to emphasize that licensees should not rely on the NRC's authority to exercise enforcement discretion as a routine substitute for compliance or for requesting a license amendment.

Finally, it is expected that the NRC staff will exercise enforcement discretion in this area infrequently. Although a plant must shut down, refueling activities may be suspended, or plant startup may be delayed, absent the exercise of enforcement discretion, the NRC staff is under no obligation to take such a step merely because it has been requested. The decision to forego enforcement is discretionary. When enforcement discretion is to be

exercised, it is to be exercised only if the NRC staff is clearly satisfied that such action is warranted from a health and safety perspective.

### VIII. Enforcement Actions Involving Individuals

Enforcement actions involving individuals, including licensed operators, are significant personnel actions, which will be closely controlled and judiciously applied. An enforcement action involving an individual will normally be taken only when the NRC is satisfied that the individual fully understood, or should have understood, his or her responsibility; knew, or should have known, the required actions; and knowingly, or with careless disregard (i.e., with more than mere negligence) failed to take required actions which have actual or potential safety significance. Most transgressions of individuals at the level of Severity Level III or IV violations will be handled by citing only the facility licensee.

More serious violations, including those involving the integrity of an individual (e.g., lying to the NRC) concerning matters within the scope of the individual's responsibilities, will be considered for enforcement action against the individual as well as against the facility licensee. Action against the individual, however, will not be taken if the improper action by the individual was caused by management failures. The following examples of situations illustrate this concept:

- Inadvertent individual mistakes resulting from inadequate training or guidance provided by the facility licensee.
- Inadvertently missing an insignificant procedural requirement when the action is routine, fairly uncomplicated, and there is no unusual circumstance indicating that the procedures should be referred to and followed step-by-step.
- Compliance with an express direction of management, such as the Shift Supervisor or Plant Manager, resulted in a violation unless the individual did not express his or her concern or objection to the direction.
- Individual error directly resulting from following the technical advice of an expert unless the advise was clearly unreasonable and the licensed individual should have recognized it as such.
- Violations resulting from inadequate procedures unless the individual used a faulty procedure knowing it was faulty and had not attempted to get the procedure corrected.

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

- Willfully causing a licensee to be in violation of NRC requirements.
- Willfully taking action that would have caused a licensee to be in violation of NRC requirements but the action did not do so because it was detected and corrective action was taken.
  - Recognizing a violation of procedural requirements and willfully not taking corrective action.
  - Willfully defeating alarms which have safety significance.
  - Unauthorized abandoning of reactor controls.
    - Dereliction of duty.
    - Falsifying records required by NRC regulations or by the facility license.
  - Willfully providing, or causing a licensee to provide, an NRC inspector or investigator with inaccurate or incomplete information on a matter material to the NRC.
  - Willfully withholding safety significant information rather than making such information known to appropriate supervisory or technical personnel in the licensee's organization.
  - Submitting false information and as a result gaining unescorted access to a nuclear power plant.
  - Willfully providing false data to a licensee by a contractor or other person who provides test or other services, when the data affects the licensee's compliance with 10 CFR Part 50, Appendix B, or other regulatory requirement.
  - Willfully providing false certification that components meet the requirements of their intended use, such as ASME Code.
  - Willfully supplying, by contractors of equipment for transportation of radioactive material, casks that do not comply with their certificates of compliance.
  - Willfully performing unauthorized bypassing of required reactor or other facility safety systems.
  - Willfully taking actions that violate Technical Specification Limiting Conditions for Operation or other

license conditions (enforcement action for a willful violation will not be taken if that violation is the result of action taken following the NRC's decision to forego enforcement of the Technical Specification or other license condition or if the operator meets the requirements of 10 CFR 50.54 (x). (i.e., unless the operator acted unreasonably considering all the relevant circumstances surrounding the emergency).

Normally, some enforcement action is taken against a licensee for violations caused by significant acts of wrongdoing by its employees, contractors, or contractors' employees. In deciding whether to issue an enforcement action to an unlicensed person as well as to the licensee, the NRC recognizes that judgments will have to be made on a case by case basis. In making these decisions, the NRC will consider factors such as the following:

1. The level of the individual within the organization.
2. The individual's training and experience as well as knowledge of the potential consequences of the wrongdoing.
3. The safety consequences of the misconduct.
4. The benefit to the wrongdoer, e.g., personal or corporate gain.
5. The degree of supervision of the individual, i.e., how closely is the individual monitored or audited, and the likelihood of detection (such as a radiographer working independently in the field as contrasted with a team activity at a power plant).
6. The employer's response, e.g., disciplinary action taken.
7. The attitude of the wrongdoer, e.g., admission of wrongdoing, acceptance of responsibility.
8. The degree of management responsibility or culpability.
9. Who identified the misconduct.

Any proposed enforcement action involving individuals must be issued with the concurrence of the Deputy Executive Director. The particular sanction to be used should be determined on a case-by-case basis.<sup>10</sup> Notices of Violation and Orders are

<sup>10</sup> Except for individuals subject to civil penalties under section 206 of the Energy Reorganization Act of 1974, as amended, NRC will not normally impose a civil penalty against an individual. However, section 234 of the Atomic Energy Act (AEA) gives the Commission authority to impose civil penalties on "any person." "Person" is broadly defined in Section 11s of the AEA to include individuals, a variety of organizations, and any representatives or agents. This gives the Commission authority to impose civil penalties on employees of licensees or on separate entities when a violation of a requirement directly imposed on them is committed.

examples of enforcement actions that may be appropriate against individuals. The administrative action of a Letter of Reprimand may also be considered. In addition, the NRC may issue Demands for Information to gather information to enable it to determine whether an order or other enforcement action should be issued.

Orders to NRC-licensed reactor operators may involve suspension for a specified period, modification, or revocation of their individual licenses. Orders to unlicensed individuals might include provisions that would:

- Prohibit involvement in NRC licensed activities for a specified period of time (normally the period of suspension would not exceed 5 years) or until certain conditions are satisfied, e.g., completing specified training or meeting certain qualifications.
- Require notification to the NRC before resuming work in licensed activities.
- Require the person to tell a prospective employer or customer engaged in licensed activities that the person has been subject to an NRC order.

In the case of a licensed operator's failure to meet applicable fitness-for-duty requirements (10 CFR 55.53(j)), the NRC may issue a Notice of Violation or a civil penalty to the Part 55 licensee, or an order to suspend, modify, or revoke the Part 55 license. These actions may be taken the first time a licensed operator fails a drug or alcohol test, that is, receives a confirmed positive test that exceeds the cutoff levels of 10 CFR Part 26 or the facility licensee's cutoff levels, if lower. However, normally only a Notice of Violation will be issued for the first confirmed positive test in the absence of aggravating circumstances such as errors in the performance of licensed duties or evidence of prolonged use. In addition, the NRC intends to issue an order to suspend the Part 55 license for up to 3 years the second time a licensed operator exceeds those cutoff levels. In the event there are less than 3 years remaining in the term of the individual's license, the NRC may consider not renewing the individual's license or not issuing a new license after the three year period is completed. The NRC intends to issue an order to revoke the Part 55 license the third time a licensed operator exceeds those cutoff levels. A licensed operator or applicant who refuses to participate in the drug and alcohol testing programs established by the facility licensee or who is involved in the sale, use, or possession of an illegal drug is also subject to license suspension, revocation, or denial.

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

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

#### **IX. Inaccurate and Incomplete Information**

A violation of the regulations involving submittal of incomplete and/or inaccurate information, whether or not considered a material false statement, can result in the full range of enforcement sanctions. The labeling of a communication failure as a material false statement will be made on a case-by-case basis and will be reserved for egregious violations. Violations involving inaccurate or incomplete information or the failure to provide significant information identified by a licensee normally will be categorized based on the guidance herein, in Section IV, "Severity of Violations," and in Supplement VII.

The Commission recognizes that oral information may in some situations be inherently less reliable than written submittals because of the absence of an opportunity for reflection and management review. However, the Commission must be able to rely on oral communications from licensee officials concerning significant information. Therefore, in determining whether to take enforcement action for an oral statement, consideration may be given to factors such as (1) the degree of knowledge that the communicator should have had, regarding the matter, in view of his or her position, training,

and experience; (2) the opportunity and time available prior to the communication to assure the accuracy or completeness of the information; (3) the degree of intent or negligence, if any, involved; (4) the formality of the communication; (5) the reasonableness of NRC reliance on the information; (6) the importance of the information which was wrong or not provided; and (7) the reasonableness of the explanation for not providing complete and accurate information.

Absent at least careless disregard, an incomplete or inaccurate unsworn oral statement normally will not be subject to enforcement action unless it involves significant information provided by a licensee official. However, enforcement action may be taken for an unintentionally incomplete or inaccurate oral statement provided to the NRC by a licensee official or others on behalf of a licensee, if a record was made of the oral information and provided to the licensee thereby permitting an opportunity to correct the oral information, such as if a transcript of the communication or meeting summary containing the error was made available to the licensee and was not subsequently corrected in a timely manner.

When a licensee has corrected inaccurate or incomplete information, the decision to issue a Notice of Violation for the initial inaccurate or incomplete information normally will be dependent on the circumstances, including the ease of detection of the error, the timeliness of the correction, whether the NRC or the licensee identified the problem with the communication, and whether the NRC relied on the information prior to the correction. Generally, if the matter was promptly identified and corrected by the licensee prior to reliance by the NRC, or before the NRC raised a question about the information, no enforcement action will be taken for the initial inaccurate or incomplete information. On the other hand, if the misinformation is identified after the NRC relies on it, or after some question is raised regarding the accuracy of the information, then some enforcement action normally will be taken even if it is in fact corrected. However, if the initial submittal was accurate when made but later turns out to be erroneous because of newly discovered information or advance in technology, a citation normally would not be appropriate if, when the new information became available or the advancement in technology was made, the initial submittal was corrected.

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

#### **X. Enforcement Action Against Non-Licensees**

The Commission's enforcement policy is also applicable to non-licensees, including contractors and subcontractors, holders of NRC approvals, e.g., certificates of compliance, early site permits, standard design certificates, quality assurance program approvals, or applicants for any of them, and to employees of any of the foregoing, who knowingly provide components, equipment, or other goods or services that relate to a licensee's activities subject to NRC regulation. The prohibitions and sanctions for any of these persons who engage in deliberate misconduct or knowing submission of incomplete or inaccurate information are provided in the rule on deliberate misconduct, e.g., 10 CFR 30.10 and 50.5.

Contractors who supply products or services provided for use in nuclear activities are subject to certain requirements designed to ensure that the products or services supplied that could affect safety are of high quality. Through procurement contracts with licensees, suppliers may be required to have quality assurance programs that meet applicable requirements, e.g., 10 CFR Part 50, Appendix B, and 10 CFR Part 71, Subpart H. Contractors supplying certain products or services

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