DS09
B. Borchardt

64FR 61142
Nov. 9, 1999

NUCLEAR ENERGY INSTITUTE

RECEIVED
1999 DEC 10 AM 9:43
RULES & DIR. BRANCH
US NRC

(3)

Ellen C. Ginsberg
Deputy General Counsel

December 9, 1999

Mr. David L. Meyer
Chief, Rules and Directives Branch
Division of Administrative Services
Office of Administration
Mail Stop: T6D59
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

SUBJECT: Revision of the NRC Enforcement Policy (64 Fed. Reg. 61142; November 9, 1999)

Dear Mr. Meyer:

On behalf of the nuclear energy industry, the Nuclear Energy Institute[1] submits the following comments on the revisions to the Enforcement Policy, published November 9, 1999. (64 Fed. Reg. 61142). The NRC previously has issued changes to various aspects of the Enforcement Policy and published individual notices of those changes in the Federal Register. The instant revisions to the Enforcement Policy consolidate the previously announced substantive changes and reorganize the Enforcement Policy to achieve greater clarity and coherence.

The revised Enforcement Policy includes the Interim Enforcement Policy being used for the reactor oversight process pilot plant study. The August 9, 1999 notice announcing implementation of the Interim Policy states that, if successfully used in the pilot plant study, the Interim Policy will be applied to all reactors. 64 Fed. Reg. 43229. When the NRC implements the new oversight process industry-wide, we would expect the NRC again to revise the Enforcement Policy, substituting the Interim Policy's enforcement approach as it applies to certain Part 50 violations and associated license conditions

---

[1] NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

PDR REVGP NEI

1776 I STREET, NW SUITE 400 WASHINGTON, DC 20006-3708 PHONE 202.739.8000 FAX 202.785.4019 www.nei.org

The industry's previous comments on the individual substantive changes to the Enforcement Policy articulate our strong support for the NRC's new enforcement program. We continue to believe the principles underlying the new program represent sound public policy. For example, the revised approach for assessing the significance of violations – which considers actual safety consequences, risk significance of potential consequences, impact on the NRC's regulatory function, and willfulness – represents an appropriate and effective evaluative model for NRC enforcement. Eliminating the undefined and, therefore, inherently subjective concept of "regulatory significance," as well the practice of "aggregating" lesser violations to increase the assigned severity level, also will foster more focused and objective enforcement actions.

Notwithstanding our support for the revised enforcement program overall, the industry suggests that the NRC re-evaluate a few remaining issues. First, Section IV(A)(2)(a) of the Enforcement Policy continues to state that licensees are entitled to corrective action credit if, prior to a nonwillful Severity Level III violation, the licensee "has not had *any* previous escalated actions (regardless of the activity area) during the past 2 years or 2 inspections, whichever is longer." 64 Fed. Reg. at 61151. The broad sweep of this criterion (i.e., "regardless of activity area") makes obtaining credit very difficult, even given the prospect of somewhat fewer expected Level III violations based on the more objective evaluation likely to be achieved through the significance determination process. Despite the industry's sustained excellent safety performance, even the NRC recognizes that licensees may receive an occasional violation in a two-year period. Given that this criterion was designed to account for strong safety performance over time, the Enforcement Policy should be clarified to state that the criterion is met *unless the previous violation is in the same functional area as the current violation.*

Second, the NRC should delete the statement in the Enforcement Policy that the "NRC will continue to consider willful violations involving licensees and their employees, including the ability to maintain a safety conscious work environment." 64 Fed. Reg. at 61143. The meaning of this statement is very unclear. For example, is the Policy being used to try to establish a regulatory basis for escalated enforcement based on a licensee's perceived "ability to maintain a safety conscious work environment?" If so, the industry strongly objects to the broad notion that a willful violation under 10 CFR 50.7 would allow the NRC to take enforcement action for a licensee's failure to maintain a safety conscious work environment. As the industry has stated in response to previous efforts to regulate the work environment at NRC-licensed nuclear plants, no regulatory basis exists for such

action.[2] The agency has declined to take further action on its proposal to codify attributes of a safety conscious work environment because the NRC could not identify legally sound criteria to define a safety conscious work environment.[3] Government enforcement action, which directly affects fundamental rights of licensees and the careers of individual nuclear industry employees, simply cannot be based on undefined and highly subjective criteria or attributes.

With respect to enforcement actions for discrimination pursuant to 50 CFR 50.7, the industry has some continuing concerns regarding the agency's current direction and policy. Some aspects of EGM 99-007, published September 20, 1999, heighten these concerns. Specifically, the guidance on how an Office of Investigation's report should describe the basis for a Section 50.7 case does not adequately address the elements that must be proven in order to cite a licensee for a Section 50.7 violation. The guidance does not address the shifting burdens of proof critical to any analysis of a discrimination case, particularly where there may be mixed motives. In the employment discrimination context, an adequate nexus must be established between the alleged adverse action and the protected activity, and adverse action may be appropriate based upon legitimate reasons notwithstanding the inference of some retaliatory motive. In practice, however, the NRC seems to have concluded that any adverse action taken against an employee who is known to have engaged in protected activity necessarily is a violation of Section 50.7. This position is inconsistent with the specific language of Subsection 50.7(d), employment laws, and the analysis of the Millstone Independent Review Team. As such, NRC should clarify its enforcement guidance to reflect the proper legal standards that apply to cases involving alleged violations of 10 CFR 50.7.

Third, as the NRC moves its regulatory approach, including its Enforcement Policy, to one that is more risk-informed, it would be appropriate to re-visit the examples in the supplements. The supplements are important because, in practice, they provide examples of violations and severity levels which NRC staff tends to use as a guide to enforcement action. We recognize that traditional enforcement severity levels will have less importance when the NRC begins to apply industry-wide the interim process used for the reactor oversight process pilot plant study. However, the examples of severity levels are likely to affect issues not subject to the significance determination process, as those issues continue to be subjected to traditional

---

[2] See, e.g., Letter from Ralph E. Beedle to David L. Meyer, May 27, 1997, responding to NRC Request for Comment on NRC Proposed Strategies to Address the Need for a Safety Conscious Work Environment.

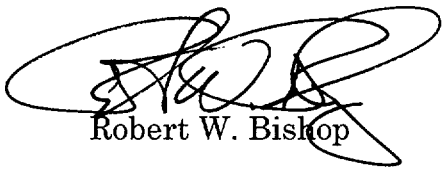
[3] See 63 Fed. Reg. 6235; February 6, 1998.

enforcement. Matters retained for traditional enforcement should be evaluated through a more risk-informed approach which should be reflected in the supplements. For example, violations of reporting requirements, the completeness and accuracy rule, and 10 C.F.R. 50.59 all should be assessed for severity level with some consideration of the safety or risk significance of the underlying technical issue. Employment discrimination violations also presently are assessed a severity level based on who is responsible for the violation and not on the underlying safety concern or the egregiousness of the alleged discrimination. This approach is neither realistic (employment decisions often involve the judgments of whole organizations, rather than individuals) nor risk-informed (disputes centered on matters of little or no safety or risk significance should not be cited at the highest severity levels).

In conclusion, the industry believes the revised Enforcement Policy is a clearer, more coherent guidance document. It well reflects the NRC's extensive efforts to address industry and other stakeholder concerns. The announced revisions demonstrate the agency's commitment to a more risk-informed, performance-based regulatory scheme and should make NRC enforcement action a more effective regulatory tool.

With respect to remaining substantive issues and revision of the supplements, we would welcome the opportunity to participate in further stakeholder discussions with NRC staff.

Sincerely,



Robert W. Bishop

c: Richard W. Borchardt, Director, Office of Enforcement, NRC
Karen D. Cyr, General Counsel, NRC