NUCLEAR ENERGY INSTITUTE

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VICE PRESIDENT &
GENERAL COUNSEL

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Mr. David L. Meyer, Chief
Rules and Directives Branch
Division of Administrative Services
Office of Administration
Mail Stop: T-6 D59
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

SUBJECT: Request for Comments on Revision of the NRC's General Statement of Policy and Procedure for NRC Enforcement Actions

Dear Mr. Meyer:

On behalf of the nuclear power industry, the Nuclear Energy Institute[1] is pleased to provide comments on the revision of the NRC's General Statement of Policy and Procedure for NRC Enforcement Actions, NUREG-1600 ("Enforcement Policy" or "Policy") published in the Federal Register May 1, 2000 (65 Fed. Reg. 25368). Although these comments are being filed subsequent to the date for submission set out in the Federal Register, we request that they be fully considered by the agency.[2]

The Enforcement Policy revision is the result of extensive effort by NRC staff working in conjunction with many stakeholders, including representatives of the industry and public interest groups. The NRC staff should be commended for its willingness to obtain, and to try to fully understand, stakeholder views prior to implementing changes to the Policy. We also believe that significant benefit was derived from testing many of the new features proposed for the NRC's enforcement

[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.

[2] Enclosed is NEI's letter to Mr. William Borchardt, Director of NRC Office of Enforcement, dated May 9, 2000, notifying the agency that NEI's comments would be submitted June 15, 2000.

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program as part of the NRC's revised reactor oversight process pilot study prior to institutionalizing the revised Enforcement Policy.

The NRC's revised Enforcement Policy, overall, is an excellent example of the agency's strong commitment to regulatory reform. The revised Enforcement Policy will help the agency achieve its goal of a "unified agency approach for determining and responding to performance issues"[3] because enforcement action now is coordinated with the agency's other actions in response to licensee performance. By using the Significance Determination Process (SDP) to determine the color band for each inspection finding which constitutes a violation, the enforcement program will address such violations in a manner consistent with the safety significance of the violation. Thus, enforcement action is appropriately focused on the as-found condition of a particular violation and, therefore, will not be used as a surrogate for other regulatory action to address programmatic issues, and it will not be duplicative of other agency action on a given issue.

The revised Enforcement Policy also meets the NRC's agency-wide objective of implementing a more risk-informed and performance-based regulatory approach. The revised Enforcement Policy recognizes that licensee Corrective Action Programs (CAP) appropriately assign priority to and track the disposition of violations (as well as other issues found by the licensee). Licensee CAPs are responsible for addressing the issues underlying Non-Cited Violations but, as a result of the revised Policy, the licensee no longer will be saddled with burdensome explanatory and follow-up submissions to the agency for items of minimal safety significance. Also, because most Level IV violations will be treated as Non-Cited Violations for which no response is required, licensees no longer will be compelled to place a higher priority on non-safety significant violations than is merited by their level of risk significance. Both of these features of the revised Policy will avoid unnecessary expenditure and diversion of NRC and licensee resources on items of limited risk or safety significance.

Finally, the revised Enforcement Policy represents a process that is more understandable to licensees and, we would expect, to the public, because future enforcement action will not be based upon subjective concepts such as "regulatory significance" or "aggregation." Using more objective criteria as the bases for enforcement action will result in a more consistent agency response to similar violations (among licensees and across NRC regions) and, importantly, will focus on items objectively determined to be safety-significant.

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[3] 65 Fed. Reg. at 25368.

Although the industry believes that the regulatory approach embodied in the revised Enforcement Policy represents a very significant improvement over the agency's past enforcement program, there are other revisions to the Enforcement Policy that the agency should consider in order to improve the program even further. Broadly categorized, we believe the NRC should reconsider (1) the use of "repetitiveness"[4] as one of the four criteria for determining when a Notice of Violation (NOV) should be issued for a Level IV violation rather than an NCV; (2) the Enforcement Policy's failure to consider the safety and risk significance of violations associated specifically with recordkeeping and 10 CFR 50.9; (3) the bases and severity levels for enforcement action for violations of 10 CFR 50.7; (4) aspects of the Enforcement Policy related to predecisional enforcement conferences, including the criteria used to determine whether an individual will be granted a predecisional enforcement conference; and (5) the Policy's determination that comparisons of significance between activity areas are not appropriate for assignment of severity levels. We provide below greater detail regarding the bases for our concerns in these areas and suggested remedies.

1. Use of "repetitiveness" as a criterion for determining when a Notice of Violation should be issued for a Level IV violation.

It has long been and continues to be the industry's position that the NRC should eliminate the use of "repetitiveness" as a criterion for determining when a NOV, rather than a NCV, should be issued for a Level IV violation. Use of the term "repetitive" is flawed because it remains undefined. How many violations constitute a "repetitive" problem? Is a violation repetitive if it involves the same equipment but a different cause or the same cause but a different discipline? The lack of definition is likely to cause enforcement actions for items of minimal safety significance to be inconsistent and unpredictable – a shortcoming of the previous system.

Further, a violation does not become safety significant merely because it is "repetitive" of a previous non-safety significant violation. If the NRC observes several non-safety significant violations, the inspections and performance indicators used in the oversight process will provide a systematic means for determining whether these circumstances have any performance implications bearing on plant safety. If there is a "repetitive" violation, but inspections and performance indicators find no significant adverse impact on risk or safety, the enforcement process should not artificially inflate the significance of the violation and contradict that which the oversight process has found.

[4] 65 Fed. Reg. at 25377.

Singling out "repetitive" violations for special treatment also reverts to an approach used in the past – forcing licensees to place a higher priority on a class of violations that have been determined not to be significant from a safety perspective. Because the items that would be subject to this exception are, by definition, of low safety significance, licensees should not be required to place a higher priority on them than on other items of comparable – or greater – safety significance. In essence, using "repetitiveness" as an exception to NCV treatment renders enforcement a supplemental assessment process for evaluating the licensee's corrective action program – precisely the result the RROP is designed to avoid. For this and the other reasons cited above, the "repetitiveness" criterion should be eliminated.

2. The Enforcement Policy should establish that safety and risk significance of violations associated with recordkeeping and 10 CFR 50.9 normally will be considered.

The revised Enforcement Policy retains the historic approach to enforcement associated with violations of recordkeeping and 10 CFR 50.9. The NRC has retained this approach based on its contention that it is difficult to assess the risk significance of these violations. While the industry understands that the NRC must ensure the integrity of its regulatory processes, achieving that result is not undermined by applying, to the maximum extent practical, the same kinds of risk-informed principles that undergird the reactor oversight and inspection processes.

Notably, the NRC has already recognized the need to connect enforcement action to a violation's underlying risk significance and has implemented precisely such an approach in, for example, the revised treatment of violations of 10 CFR 50.59. Under the revised Enforcement Policy, the significance of a 10 CFR 50.59 or related violation now is based on the resulting physical, procedural or analytical change to the facility and its safety significance as evaluated through the SDP – thus ensuring a consistent approach for significance determinations.[5] A risk-based approach (using the SDP or other appropriate evaluative tool) certainly could be applied similarly to 10 CFR 50.9 violations.

While the industry recognizes that factors such as willfulness must be a part of significance determinations related to 10 CFR 50.9 violations, that factor is probably most germane to the issue of whether enforcement action against an individual is appropriate. With respect to enforcement actions against licensees (based on imputed responsibility for contractors and employees), the severity level

[5] 65 Fed. Reg. at 25370.

of an enforcement action for a recordkeeping or 50.9 violation could be made proportionate to the significance of the subject of the inaccuracy and the actual impact it had on regulatory action.[6] The agency's current treatment of inaccuracies in performance indicator data uses precisely this approach. The type of enforcement action to be taken should be dependent on the safety significance of the information and how the inaccuracy has affected the NRC's ability to assess performance.[7] This concept should be adopted for all recordkeeping violations and violations of Section 50.9.

3. The NRC should revise several aspects of the Enforcement Policy related to enforcement action for violations of 10 CFR 50.7.

For some time, the industry has maintained that the guidance for severity levels for Section 50.7 violations should be re-evaluated. First, we note that the supplements to the revised Enforcement Policy continue to use the level of the management individual allegedly responsible for the discrimination as the sole basis for determining severity level. The NRC should reconsider the severity level examples in order to better reflect the significance of violations in this area. Severity levels should account more fully for the totality of the circumstances associated with a violation of 50.7, including the nature of the alleged discrimination, the importance of the underlying safety concerns, and the realistic potential (if any) for chilling of the work environment.

Supplement VII states that a violation involving "threats of discrimination" may be assigned Severity Level III. This language is vague and appears to be inconsistent with the agency's current implementation of 10 CFR 50.7. While actual discrimination is a violation of 50.7, it is not clear from the Enforcement Policy what a "threat of discrimination" is, or how it could be a violation if no actual discrimination is found to have occurred. The Policy here appears to contemplate the assignment of a severity level to events that may not actually be violations, an untenable result. The reference to "threats of discrimination" should be deleted.

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[6] Material licensees generally have found 10 CFR 30.50 to be difficult to interpret. Because of this difficulty, the NRC should consider including examples of violations of 10 CFR 30.50 notification requirements in the Enforcement Policy, an Enforcement Guidance Memorandum, or an Information Notice.

[7] The NRC will not take enforcement action for an inaccuracy that is corrected by the licensee before it is relied upon by the NRC but which would, in any event, not have changed the NRC's safety assessment (no change in the color band). In contrast, an inaccuracy only discovered by the NRC and masking a significant change in the level of safety performance, as measured by the performance indicator thresholds, may result in escalated enforcement and a civil penalty.

In addition to the need to revise the severity level examples, the industry also believes that more precise guidance on enforcement action for discrimination violations would be appropriate – whether in the Enforcement Policy or in other enforcement guidance documents.[8] The agency's current approach to handling these violations should be revisited and, in our view, modified to ensure that a proper balance is struck. This balance must ensure both that workers in the nuclear industry are free to identify safety concerns and that licensees have the ability to effectively manage their facilities in order to protect the public health and safety. Licensees strongly encourage all workers to identify safety issues. Identification of safety issues is an integral part of most nuclear workers' assignments and responsibilities. In the absence of more precise guidance on the bases for enforcement actions for discrimination violations, some licensees perceive themselves as unable to take required personnel actions for clearly legitimate business reasons.

We believe that the NRC's analysis used to arrive at enforcement decisions on potential Section 50.7 violations often does not appropriately consider legitimate business reasons for a licensee's action, if the worker at issue has engaged in protected activity at some point in the near or distant past. The NRC has stated that the agency "bears the burden to prove *by a preponderance of the evidence* that one of the reasons for the adverse action taken by the licensee was that the individual engaged in protected activity."[9] However, existing enforcement guidance does not adequately ensure that enforcement action is based on substantial probative, reliable and credible evidence of a causal nexus between the alleged adverse action and the protected activity.

Enforcement guidance in this area also could fruitfully address enforcement process issues. Discrimination violations often follow investigations by the Department of Labor ("DOL") or the NRC's Office of Investigations. Currently, it often appears that once findings are made in this context, the NRC's enforcement process becomes an adversarial, seemingly prosecutorial, process. The predecisional enforcement conference frequently seems less directed at understanding all the evidence and arguments bearing on an issue than at merely establishing a prima facie case on which the NRC can proceed to issue an enforcement action. A better process would involve a full evaluation of the case, including fair consideration of the reasons

[8] We understand that hereinafter the NRC will issue Enforcement Guidance Memoranda ("EGM") for stakeholder comment. We believe that that is an appropriate means of ensuring the NRC makes fully informed Enforcement Policy implementation decisions and is aware of their practical impact. As such, we strongly support notice and comment on EGMs.

[9] See NRC responses, dated May 18, 2000, to post-hearing questions submitted by the U.S. Senate Committee on Environment and Public Works, Subcommittee on Clean Air, Wetlands, Private Property and Nuclear Safety.

given by the licensee for the employment action, by independent agency managers, before the NRC takes the significant, public step of an enforcement action.

Further, consideration also should be given to the enforcement action appeal processes. A practical process to appeal enforcement actions would provide an appropriate check on the enforcement arm of the agency and an appropriate forum for resolution of important legal issues. However, in contrast to the prevailing perception of the current situation, such a process must be accessible and timely.

The revised Enforcement Policy also should be reviewed to reconsider the NRC's exercise of discretion for discrimination cases based on a licensee's willingness to settle. In particular, the Policy notes that the NRC may exercise discretion not to take enforcement action if a case brought before the DOL is settled, the licensee addresses the overall work environment, and (if the DOL has made a finding of discrimination but the case is settled prior to an evidentiary hearing) the licensee has publicized that the complaint was settled to the satisfaction of the employee. The industry in general supports a policy that encourages and rewards settlement. Certainly this can be effective to address any "chilling effect" that might be perceived. On the other hand, punishing a licensee that does not settle, that simply wants to pursue the processes available in order to vindicate its position, is an inappropriate policy.

In cases where an allegation is brought to the NRC,[10] the revised Policy states that the NRC will not exercise discretion in cases that involve a variety of circumstances, including failure to address the overall work environment, allegations of discrimination as a result of bringing information to the NRC, allegations of discrimination caused by a manager above a first-line supervisor, or allegations of discrimination where a history of findings suggests a programmatic issue, or "particularly blatant or egregious" allegations of discrimination. Overall, there are so many exceptions that the incentive for licensees to settle discrimination claims involving information brought to the NRC is substantially diminished. Also, several of the exceptions involve highly subjective terms, such as "blatant," "programmatic issue," and "egregious" – terms which are of a type the NRC has attempted to eliminate from other parts of the Enforcement Policy. We strongly suggest that the discretion discussion be wholly revised and that a clearer, more objective discretion policy be adopted to provide simple, more usable and, therefore, more effective incentives for settlement.

[10] We note that the NRC has not offered a principled basis – and there does not appear to be one – for treating concerns brought to the NRC differently from those brought to the DOL or to the licensee.

4. The NRC should revise several aspects of the Enforcement Policy related to the predecisional enforcement conference.

The Enforcement Policy contains criteria that, in effect, limit the opportunity for an individual to participate in an enforcement conference before the NRC takes escalated enforcement against the individual.[11] Whether the NRC will make this opportunity available to an individual will depend on a variety of factors, including "the severity of the issue, the significance of the action the NRC is contemplating, and whether the individual has already had the opportunity to address the issue (e.g., in an Office of Investigation or Department of Labor hearing)."[12] These limits are too narrow and subjective. For example, the NRC and the individual may have widely differing views about the severity of the issue and about the significance of the NRC action (e.g., even a letter from the NRC to an individual critical of his or her performance can have severe career consequences).

Furthermore, individuals should not be denied a predecisional enforcement conference because they are deemed to have had an opportunity to address enforcement issues in a DOL hearing or OI investigation. First, few DOL cases name individuals as parties and, therefore, the individual may not have had the chance to present his own case. Second, DOL uses different standards for discrimination than those currently applied to individuals by the NRC. Third, OI investigations often do not provide a meaningful opportunity to address an issue. Typically, OI interviewees are not told whether they are targets of the investigation, are not given the chance to present favorable evidence or question the investigator's report or conclusions, and are often not told what the issue under investigation is. The investigations are conducted in secret, and an individual normally does not have the chance to have other knowledgeable individuals present, to provide information, or to review and respond to the report prepared by OI. To imply that these investigations present an individual with an opportunity to meaningfully address the issues is misleading. The criteria limiting the opportunity for an individual to have an enforcement conference should be abandoned.

With respect to allowing enforcement conferences to be open to public, Section V of the revised Policy states that conferences normally will not be open to the public if the enforcement action being contemplated "is based on the findings of an NRC Office of Investigations report that has not been publicly disclosed."[13] The

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[11] See Section V., "Predecisional Enforcement Conferences," 65 Fed. Reg. at 25375.

[12] Id.

[13] Id.

statement implies there are cases in which the NRC makes OI reports public before enforcement conferences and that, even when the reports are not made public, the participants in the conference can meaningfully address the report on which the conference "is based." Neither is true. In cases where information regarding an OI report is provided prior to the enforcement conference, it is not the report itself, but typically only a vague and short summary (e.g., often only a few short paragraphs are provided to summarize a more than 100-page report). This allows neither the public nor the participants in the conference to gain a meaningful opportunity to examine the factual foundation of the report and its conclusions. Because this statement misrepresents actual NRC practice, and is inconsistent with NRC's principles of good regulation, which call for public transparency, the language should be deleted. More importantly, NRC's practice in this area should be reformed so that licensees or individuals subject to enforcement, based upon the results of an OI investigation, have a meaningful chance to participate in an enforcement conference. Absent specific NRC findings demonstrating otherwise, licensee senior management should be provided with the complete findings of the investigation. If necessary, disclosures of specific information could be made with, for example, restrictions on further distribution.

5. <u>The Enforcement Policy should provide for consistency of severity levels across activity areas</u>.

The revised Enforcement Policy's approach to assignment of severity levels is incompatible with the NRC's overall effort to make its processes transparent to the public, and to achieve consistency between enforcement, the oversight process, and the actual risk and safety significance of the underlying violations. This incompatibility is explicit in the Policy's statement in Section IV.B that "Comparisons of significance between activity areas are not appropriate. For example, the immediacy of any hazard to the public associated with Severity Level I violations in Reactor Operations is not directly comparable to that associated with Severity Level I violations in Facility Construction."[14] We believe that every effort should be made to ensure that severity levels have a consistent meaning in terms of risk to the public and that Severity Level I violations, in particular, should be reserved for situations in which adverse actual consequences occur. Under the current policy, some Severity Level I violations, such as actual releases of radioactivity above regulatory limits, involve actual consequences, while others, such as a 50.7 violation involving a safety concern (that was determined to be untrue or, even if true, would have no safety impact) could involve no such consequences. By failing to use a single comparative standard for these violations,

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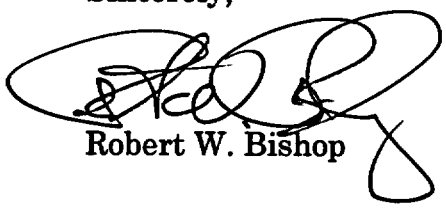
[14] 65 Fed. Reg. at 25375.

the public is misled as to the actual risk presented by the violation. This approach thus undermines both the regulatory consistency and transparency to the public of the NRC's enforcement actions.

Conclusion

In sum, the industry strongly supports the substantial changes contained in the Enforcement Policy, but believes that the agency should reconsider the broad categories of remaining issues discussed above. Further improvement of the Enforcement Policy will ensure that it fully meets the agency's principles of good regulation. We look forward to participating in all stakeholder meetings or other activities on further Enforcement Policy reform.

Sincerely,



Robert W. Bishop

Enclosure

c: R. William Borchardt, Director OE