

December 23, 2004

MEMORANDUM TO: Chairman Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: Luis A. Reyes **/RA Ellis W. Merschoff Acting For/**
Executive Director for Operations

SUBJECT: FIRE PROTECTION RULE 10 CFR 50.48(c) (NFPA 805 RULE)
INTERIM ENFORCEMENT DISCRETION POLICY EXTENSION

By letter dated July 7, 2004, the Nuclear Energy Institute (NEI) requested additional enforcement discretion regarding the final rule amending 10 CFR 50.48. This rule became effective on July 16, 2004, and allows licensees to adopt 10 CFR 50.48(c), a voluntary risk-informed, performance-based alternative to current fire protection requirements. The agency concurrently revised the Commission's Enforcement Policy to provide interim enforcement discretion during a "transition" period. The interim enforcement discretion policy includes provisions to address (1) noncompliances identified during the licensee's transition process and, (2) existing identified noncompliances. One of the criteria that must be met to exercise discretion for existing noncompliances is that the licensee must submit a letter of intent to adopt 10 CFR 50.48(c) within 6 months of the effective date of the final rule. Therefore, the current deadline for the letter of intent to allow discretion for existing noncompliances is January 16, 2005. NEI's letter proposed an extension of about a year for licensees to submit the letter of intent.

In accordance with the current Commission-approved Enforcement Policy, for noncompliances identified as part of the transition to 10 CFR 50.48(c), the enforcement discretion period begins upon the receipt of a letter from the licensee stating their intention to adopt 10 CFR 50.48(c) and it would remain in effect for up to two years. Furthermore, when the licensee submits a license amendment request to complete the transition to 10 CFR 50.48(c), the enforcement discretion will continue until the NRC approval of the license amendment request.

The current deadline for the letter of intent to allow discretion for existing noncompliances is January 16, 2005. Therefore, if a licensee submits a letter of intent on or before January 16, 2005, the enforcement discretion would remain in effect until January 15, 2007. NEI requested that the agency extend the deadline for the letter of intent from

CONTACT: Renée M. Pedersen, OE
(301) 415-2742

January 16, 2005, to December 31, 2005. According to NEI, the primary basis for this request is to accommodate the licensee planning and budgeting for transition to 10 CFR 50.48(c). NEI also stated that, "The net effect of this enforcement discretion provision, as currently written, is that few if any licensees will consider adopting 10 CFR 50.48 (c) in the near term."

The staff has considered NEI's request in light of possible safety implications, the NRC's regulatory philosophy to provide incentives for licensees to move to risk-informed, performance-based fire protection requirements, and the NRC's need to put long standing fire protection issues on a closure path.

When the enforcement discretion policy was issued, the decision was made to limit the time allowed to submit a letter of intent to six months for existing noncompliances to prevent undue delays in either restoring compliance to 10 CFR 50.48(b) or establishing compliance to 10 CFR 50.48(c). The staff did not consider the challenges imposed on the licensees in budgeting and planning. After receiving NEI's request to extend the time allowed for the letter of intent by one year, the staff reevaluated potential safety concerns associated with a one year extension to existing noncompliances. The staff has concluded that granting NEI's request does not adversely affect public health and safety because:

- Enforcement discretion does not apply to the risk-significant issues, which under the Reactor Oversight Process would be evaluated as Red.
- Enforcement discretion does not apply to issues that would be categorized as Severity Level I.
- The licensee is required to adopt compensatory measures until compliance is either restored in accordance with 10 CFR 50.48(b) or achieved per 10 CFR 50.48(c), and
- Licensees would be identifying and addressing new issues during the transition process that otherwise would likely not be identified.

In addition to allowing licensees adequate time for budgeting and planning to adopt NFPA 805, this extension will also allow licensees to consider the draft Regulatory Guide (RG) and the probabilistic risk assessment (PRA) and fire modeling tools in their decision. This RG and the PRA were issued for public comment in October 2004. The fire modeling tools will be issued for public comment in Summer 2005.

Therefore, I recommend that you approve publication of a *Federal Register* notice (Attached) announcing the modification to the Enforcement Policy to extend the deadline for the letter of intent for existing noncompliances from January 16, 2005, to December 31, 2005.

SECY, please track.

Attachment: *Federal Register* Notice

cc: SECY
OGC
DOC
OCA
OPA
CFO

NUCLEAR REGULATORY COMMISSION

[NUREG - 1600]

NRC Enforcement Policy; Extension of Enforcement Discretion of Interim Policy

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement: revision.

SUMMARY: The Nuclear Regulatory Commission (NRC) is revising its General Statement of Policy and Procedure for NRC Enforcement Actions (NUREG-1600) (Enforcement Policy or Policy) to extend the interim enforcement policy regarding enforcement discretion for certain issues involving fire protection programs at operating nuclear power plants.

DATES: This revision is effective (insert date of publication in the *Federal Register*).

Comments on this revision to the Enforcement Policy may be submitted on or before (insert date 30 days after publication in the *Federal Register*).

ADDRESSES: Submit written comments to: Michael T. Lesar, Chief, Rules and Directives Branch, Division of Administrative Services, Office of Administration, Mail Stop: T6D59, U. S. Nuclear Regulatory Commission, Washington, DC 20555-0001. Hand deliver comments to: 11555 Rockville Pike, Rockville, Maryland, between 7:30 a.m. and 4:15 p.m., Federal workdays.

Copies of comments received may be examined at the NRC Public Document Room, Room O1F21, 11555 Rockville Pike, Rockville, MD. You may also email comments to nrcprep@nrc.gov.

The NRC maintains the current Enforcement Policy on its Web site at <http://www.nrc.gov>, select **What We Do, Enforcement**, then **Enforcement Policy**.

FOR FURTHER INFORMATION CONTACT: Sunil Weekrakkody, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, (301) 415-2870, e-mail (SDW1@nrc.gov) or Renée Pedersen, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555-0001, (301) 415-2742, e-mail (RMP@nrc.gov).

SUPPLEMENTARY INFORMATION:

On June 16, 2004, the NRC published in the *Federal Register* a final rule amending 10 CFR 50.48 (69 FR 33536). This rule became effective on July 16, 2004, and allows licensees to adopt 10 CFR 50.48(c), a voluntary risk-informed, performance-based alternative to current fire protection requirements. The NRC concurrently revised its Enforcement Policy (69 FR 33684) to provide interim enforcement discretion during a “transition” period. The interim enforcement discretion policy includes provisions to address (1) noncompliances identified during the licensee’s transition process and, (2) existing identified noncompliances.

In accordance with the current Enforcement Policy, for noncompliances identified as part of the transition to 10 CFR 50.48(c), the enforcement discretion period begins upon the receipt of a letter of intent from the licensee stating its intention to adopt 10 CFR 50.48(c) and it would

remain in effect for up to two years. Furthermore, when the licensee submits a license amendment request to complete the transition to 10 CFR 50.48(c), the enforcement discretion will continue until the NRC approval of the license amendment request.

The second element of the interim enforcement discretion policy provides enforcement discretion for licensees who wish to take advantage of the new rule to resolve existing noncompliances. One of the criteria that must be met to exercise this discretion is that the licensee must submit a letter of intent to adopt 10 CFR 50.48(c) within 6 months of the effective date of the final rule. Therefore, the current deadline for the letter of intent to allow discretion for existing noncompliances is January 16, 2005.

As a result, if a licensee submits a letter of intent on or before January 16, 2005, (in order to meet the second discretion element) the enforcement discretion for noncompliances identified during the licensee's transition process (the first discretion element) would remain in effect until January 15, 2007.

By letter dated July 7, 2004, the Nuclear Energy Institute (NEI) (ADAMS Accession ML042010132) requested additional enforcement discretion regarding the final rule amending 10 CFR 50.48. NEI requested that NRC extend the deadline for the letter of intent from January 16, 2005, to December 31, 2005. According to the NEI letter, the primary basis for this request is to accommodate the licensee planning and budgeting for transition to 10 CFR 50.48(c).

The NRC considered NEI's request in light of possible safety implications, the NRC's regulatory philosophy to provide incentives for licensees to move to risk-informed, performance-

based fire protection requirements, and the NRC's need to put long standing fire protection issues on a closure path.

When the NRC issued the interim enforcement discretion policy, the NRC chose to limit the time allowed to submit a letter of intent to 6 months for existing noncompliances because the NRC wanted to prevent undue delays in either restoring compliance to 10 CFR 50.48(b) or establishing compliance to 10 CFR 50.48(c). The NRC did not consider the challenges imposed on the licensees in budgeting and planning. After receiving NEI's request to extend the time allowed for the letter of intent by one year, the NRC reevaluated potential safety concerns associated with a one year extension to existing noncompliances. The NRC concludes that granting NEI's request does not adversely affect public health and safety because:

- Enforcement discretion does not apply to the risk-significant issues, which under the Reactor Oversight Process would be evaluated as Red.
- Enforcement discretion does not apply to issues that would be categorized as Severity Level I.
- The licensee is required to adopt compensatory measures until compliance is either restored to 10 CFR 50.48(b) or achieved per 10 CFR 50.48(c), and
- Licensees would be identifying and addressing new issues during the transition process that otherwise would likely not be identified.

In addition to allowing licensees time for budgeting and planning to adopt 10 CFR 50.48(c), this extension will also allow licensees to consider the draft Regulatory Guide (RG) and the probabilistic risk assessment (PRA) and fire modeling tools in their decision. This RG and the PRA were issued for public comment in October 2004. The fire modeling tools will be issued for public comment in Summer 2005.

Paperwork Reduction Act

This policy statement does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.) Existing requirements were approved by the Office of Management and Budget (OMB), approval number 3150-0136. The approved information collection requirements contained in this policy statement appear in Section VII.C.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, collection of information unless it displays a currently valid OMB control number.

Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC had determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

Accordingly, the proposed revision to the NRC Enforcement Policy reads as follows:

GENERAL STATEMENT OF POLICY AND PROCEDURE FOR NRC ENFORCEMENT
ACTIONS

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INTERIM ENFORCEMENT POLICIES

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**Interim Enforcement Policy Regarding Enforcement Discretion for Certain Fire Protection
Issues (10 CFR 50.48)**

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B. Existing identified noncompliances

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In addition, licensees may have existing identified noncompliances that could reasonably be corrected under 10 CFR 50.48(c). For these noncompliances, the NRC is providing enforcement discretion for the implementation of corrective actions until the licensee has transitioned to 10 CFR 50.48(c) provided that the noncompliances meet all of the following criteria:

- (1) The licensee has entered the noncompliance into its corrective action program and implemented appropriate compensatory measures,
- (2) The noncompliance is not associated with a finding that the Reactor Oversight Process Significance Determination Process would evaluate as Red, or it would not be categorized at Severity Level I,
- (3) The licensee submits a letter of intent by December 31, 2005, stating its intent to transition to 10 CFR 50.48(c).

After December 31, 2005, as addressed in (3) above, this enforcement discretion for implementation of corrective actions for existing identified noncompliances will not be available and the requirements of 10 CFR 50.48(b) (and any other requirements in fire protection license conditions) will be enforced in accordance with normal enforcement practices.

Dated at Rockville, MD, this day of , 2004.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,

Secretary of the Commission