



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

SECRETARY

November 28, 2012

COMMISSION VOTING RECORD

DECISION ITEM: SECY-12-0047

TITLE: REVISIONS TO THE NUCLEAR REGULATORY
COMMISSION ENFORCEMENT POLICY

The Commission (with all Commissioners agreeing) approved the subject paper as recorded in the Staff Requirements Memorandum (SRM) of November 28, 2012.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

A handwritten signature in black ink, appearing to read "Annette L. Vietti-Cook", written over a horizontal line.

Annette L. Vietti-Cook
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Macfarlane
Commissioner Svinicki
Commissioner Apostolakis
Commissioner Magwood
Commissioner Ostendorff
OGC
EDO
PDR

VOTING SUMMARY - SECY-12-0047

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. MACFARLANE	X				X	11/9/12
COMR. SVINICKI	X				X	11/13/12
COMR. APOSTOLAKIS	X				X	8/27/12
COMR. MAGWOOD	X				X	10/22/12
COMR. OSTENDORFF	X				X	4/23/12

NOTATION VOTE

RESPONSE SHEET

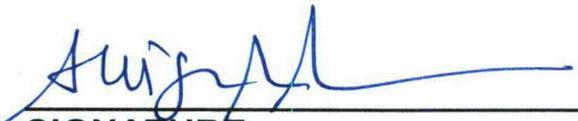
TO: Annette Vietti-Cook, Secretary
FROM: Chairman Macfarlane
SUBJECT: SECY-12-0047 – REVISIONS TO THE NUCLEAR
REGULATORY COMMISSION ENFORCEMENT
POLICY

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below XX Attached XX None _____

I approve the publication of the revised Enforcement Policy, the *Federal Register* Notice, and the Staff's recommendation for base civil penalties for uranium conversion facilities as outlined in Option 1, subject to the edits proposed by Commissioner Ostendorff and Commissioner Apostolakis and the attached additional comments.



SIGNATURE

11/9/12

DATE

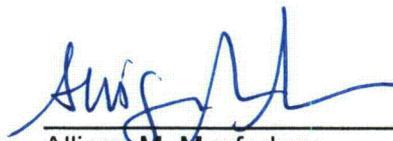
Entered on "STARS" Yes X No _____

**Chairman Macfarlane's Comments on SECY-12-0047,
"Revisions to the Nuclear Regulatory Commission Enforcement Policy"**

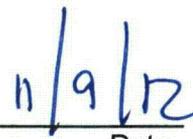
The goal of the NRC's Enforcement Policy is to support the agency's safety and security mission by encouraging the prompt identification and correction of violations of our regulations. To achieve this goal, enforcement actions, which deliver regulatory messages, must focus on safety and security, and be clearly and consistently implemented. I appreciate the Staff's efforts to carefully study the Enforcement Policy and consider the comments that were received in proposing revisions to the Policy. I believe these proposed revisions will strengthen our Enforcement Policy and further ensure that it is implemented fairly and consistently.

I approve the publication of the revised Enforcement Policy, the *Federal Register* Notice, and the Staff's recommendation for base civil penalties for uranium conversion facilities as outlined in Option 1 of SECY-12-0047, subject to the edits which have been proposed by Commissioner Ostendorff and Commissioner Apostolakis. I agree that the Enforcement Policy should be revised to state that the Staff will consult with the Commission before issuing daily civil penalties, and I note that this revision was proposed in a public comment on the Policy. I also agree with Commissioner Ostendorff that the Enforcement Policy should be revised to clarify that the Staff should consider the certainty of information concerning the trustworthiness of an individual before communicating that information, which could potentially harm that individual's ability to work, to licensees. Both of these proposed revisions will help ensure that all relevant issues and considerations are carefully weighed and considered before the agency takes regulatory action.

I also share Commissioner Magwood's concerns regarding the Staff's proposal to further evaluate the merits and potential implications of issuing civil penalties to individuals who violate our regulations, and issuing orders banning individuals from NRC-licensed activities for a period of time lasting less than one year. A ban from licensed activity is a serious penalty which should be reserved for egregious violations, and the process for imposing such a ban must be clear and consistent in order to be fair. I share Commissioner Magwood's concern that by reducing bans to periods of time of less than one year, we risk diminishing the impact of imposing a ban. Additionally, as Licensing Boards attempt to weigh different sets of circumstances to determine appropriate periods of time for such bans, maintaining the clarity, consistency and certainty of the process may be very difficult. We should also not lose sight of the fact that a ban any length of time has serious consequences for the individual who is banned. Imposing civil penalties on individuals raises similar issues because while large civil penalties may result in financial hardship for such individuals, imposing small civil penalties may send the wrong message and downplay the seriousness of a violation. While I do not oppose the Staff's further evaluation of these potential revisions to the Enforcement Policy, I expect that before recommending such revisions, the Staff will carefully consider and fully address these issues.



Allison M. Macfarlane



Date

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER SVINICKI
SUBJECT: SECY-12-0047 – REVISIONS TO THE NUCLEAR
REGULATORY COMMISSION ENFORCEMENT
POLICY

Approved XX Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below _____ Attached XX None _____



SIGNATURE

11/13 /12

DATE

Entered on "STARS" Yes No _____

Commissioner Svinicki's Comments on SECY-12-0047
Revisions to the Nuclear Regulatory Commission Enforcement Policy

I approve the 2012 revised Enforcement Policy for publication in the *Federal Register*, subject to the edits attached and those provided by Commissioner Ostendorff, in his vote; approve the draft *Federal Register* Notice (Enclosure 2 to SECY-12-0047), subject to the attached edits; and, approve the staff's recommendation for base civil penalties for uranium conversion facilities (Option 1: \$70,000). Prior to publication in the *Federal Register*, the staff should incorporate the changes to the Enforcement Policy arising from the Commission's direction in SRM-SECY-09-0190. I understand that the staff had intended to include these edits in the version of the revised policy enclosed with this SECY paper, but inadvertently neglected to do so. In any event, they should be certain to do so prior to publication.

Commissioner Ostendorff, in his vote, has proposed that the consideration of imposition of daily civil penalties be added as a matter requiring advance consultation with the Commission. He has also proposed language be inserted in the policy, which emphasizes that the NRC will strongly consider the weight and certainty of any information that may be damaging or disqualifying to personnel undergoing trustworthiness and reliability determinations, prior to any decision to notify their licensee-employer of this information. Both of these are substantive and necessary amendments, with which I agree. I endorse the inclusion of both items.

I do not support the language in the revised policy (page 36 of Enclosure 2) regarding NRC consideration of an individual's "reasons and motivations" for disclosing Safeguards Information (SGI). Commissioner Magwood speaks strongly to this point, in his vote, regarding the serious offense of deliberate release of SGI and the potential for severe and adverse security consequences resulting from this action. I am in agreement with his statements and do not repeat them here. The revised draft currently states that NRC will consider an individual's "expression of views" in assessing penalties for release of SGI. At best, this phrase is unclear. At worst, it would seem to condone the release of SGI, when motivated by philosophical objections to our regulations. The consideration of "economic gain" in the same section is also confusing. Surely, we are not condoning release of SGI for profit. My proposed edits would strike these terms.

In future revisions to the Enforcement Policy, the staff plans to consider the merits of issuing orders banning individuals from NRC-licensed activities for periods of time less than one year. While I share the view that the current process for imposing durations of one year (or longer) sets an appropriately high threshold for the imposition of this grave and serious penalty and am consequently skeptical of any change, I support the staff's evaluation of shorter duration penalties, if, after considering the concerns expressed by members of the Commission, the staff puts forward a fulsome evaluation of the implications of modifying the process to encompass shorter durations and why such proposed change would be beneficial.

Finally, I wish to compliment the staff on their willingness to re-insert a few sections that were deleted in the 2010 revision to the policy, after recognizing that the deletions had removed useful guidance on selected topics. I view this as enlightened recognition that we are receptive to feedback regarding our previous actions and evidence that we are a continuous-learning organization.



Kristine L. Svinicki

11/13/12

Edits to Enforcement Policy

appropriateness of a civil penalty for any escalated enforcement action. Notwithstanding the outcome of the normal civil penalty assessment process, discretion, as discussed in this section and in Section 3.6, "Use of Discretion in Determining the Amount of a Civil Penalty," may be exercised by either escalating or mitigating the amount of the civil penalty.

Violations assessed under the SDP normally are not considered for civil penalties. However, civil penalties are considered for violations associated with inspection findings evaluated through the ROP's SDP that involve actual consequences.

The NRC may exercise discretion and assess a separate violation and attendant civil penalty up to the statutory limit for each day the violation continues (i.e., daily civil penalties). The NRC may exercise this discretion when a licensee was aware of a violation of at least moderate significance (i.e., at least a SL III) and had a clear opportunity to prevent, identify, and correct the violation but failed to do so.

In evaluating whether daily civil penalties are appropriate, the NRC will consider such factors as whether the violation resulted in actual consequences to public health and safety or to the common defense and security, the safety significance of the violation, whether the violation was repetitive because of inadequate corrective actions, the degree of management culpability in allowing the violation to continue or in not precluding it, the responsiveness of the licensee once the violation and its significance were identified and understood, whether the continuing violation was willful, and the duration of the violation. These evaluation factors are not necessarily of equal significance; therefore, for each case, the NRC will weigh the relative importance of each contributing factor, as well as any extenuating circumstances, to determine whether it is appropriate to use daily civil penalties.

When the NRC determines that the use of daily civil penalties is appropriate as part of an enforcement action, the Agency will assess a base civil penalty for the first day of the violation in accordance with the civil penalty assessment process discussed in this section and Section 8.0, "Table of Base Civil Penalties," of the Policy. Then, to determine the total civil penalty for the continuing violation, the NRC will supplement the base civil penalty determination with a daily civil penalty for some or all of the days the violation continues. The NRC will determine the amount of the daily civil penalty on a case-by-case basis after considering the factors noted in the preceding paragraph and any relevant past precedent for similar violations. The daily civil penalty may be less than the maximum statutory daily limit in effect at the time of the violation.

The NRC considers civil penalties for violations associated with loss of regulated material (i.e., the NRC's lost source policy). The loss of NRC-regulated material is a significant regulatory and security concern because of the potential unauthorized possession or use of the material and because of the potential for overexposure to members of the public from its misuse. Such violations may include but are not limited to the loss, abandonment, improper transfer, or improper disposal of a device, source, or other form of regulated material. Notwithstanding the normal civil penalty assessment process, in cases where a licensee has lost required control of its regulated radioactive material, the NRC may exercise discretion and impose a civil penalty. However, the Agency may mitigate or escalate a civil penalty amount based on the merits of a specific case. When appropriate, the NRC may consider, for example,

c. Were the licensee's corrective actions prompt and comprehensive?

The purpose of the corrective action factor is to encourage licensees to (1) take the immediate actions necessary upon discovery of a violation that will restore safety, security, and compliance with the license, regulation(s), or other requirement(s) and (2) develop and implement (in a timely manner) the lasting actions that will not only prevent recurrence of the violation at issue, but will be appropriately comprehensive, given the significance and complexity of the violation, to prevent occurrence of violations with similar root causes.

Regardless of other circumstances (e.g., past enforcement history, identification), the licensee's corrective actions should always be evaluated as part of the civil penalty assessment process. As a reflection of the importance given to this factor, an NRC judgment that the licensee's corrective action has not been prompt and comprehensive will always result in the issuance of at least a base civil penalty.

In assessing this factor, the NRC will consider the timeliness of the corrective action (including the promptness in developing the schedule for long-term corrective action), the adequacy of the licensee's root cause analysis for the violation, and, given the significance and complexity of the issue, the comprehensiveness of the corrective action (i.e., whether the action is focused narrowly on the specific violation or broadly on the general area of concern).

Normally, the judgment of the adequacy of corrective actions will hinge on whether the NRC had to act to focus the licensee's evaluative and corrective process to obtain comprehensive corrective action. This will normally be determined at the time of the predecisional enforcement conference (e.g., by outlining substantive additional areas where corrective action is needed). Earlier informal discussions between the licensee and NRC inspectors or management may result in improved corrective action but should not normally be a basis to deny credit for corrective action. For cases in which the licensee does not receive credit for actions related to identification because the NRC identified the problem, the assessment of the licensee's corrective action should begin from the time when the NRC put the licensee on notice of the problem. Notwithstanding eventual effective comprehensive corrective action, if immediate corrective action was not taken to restore safety and compliance once the violation was identified, corrective action would not be considered prompt and comprehensive.

The NRC, in considering the comprehensiveness of the corrective action, will consider whether the licensee applied the corrective actions to all its similarly licensed operations that could be susceptible to the same failure (for those licensees having more than one facility or location). When the NRC, at the time of the enforcement conference, identifies additional peripheral or minor corrective action still to be taken, the licensee may be given credit in this area, as long as the licensee's actions addressed the underlying root cause and are considered sufficient to prevent recurrence of the violation and similar violations.

Corrective action for violations involving discrimination should normally be considered comprehensive only if the licensee takes prompt, comprehensive corrective action that

2.3.11 Inaccurate and Incomplete Information

A violation of the regulations involving the submittal of incomplete or inaccurate information 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 or applicant normally will be categorized based on the guidance herein, in Section 2.2, "Assessment of Violations," and in Section 6.9, "Inaccurate and Incomplete Information or Failure To Make a Required Report."

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 a licensee or applicant official concerning significant information. Therefore, in determining whether to take enforcement action for an oral statement, the Commission may consider 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 before the communication to ensure 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 that was inaccurate or not provided, and (7) the reasonableness of the explanation for not providing complete and accurate information.

In the absence of 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 or applicant official (e.g., information to support a Notice of Enforcement Discretion). However, enforcement action may be taken for an unintentionally incomplete or inaccurate oral statement provided to the NRC by a licensee or applicant official or others on behalf of a licensee or applicant, if a record was made of the oral information and provided to the licensee or applicant, thereby permitting an opportunity to correct the oral information. An example of such a situation would be a case in which the licensee or applicant had available a transcript of the communication or meeting summary containing the error and did not subsequently correct the error in a timely manner.

When a licensee or applicant has corrected inaccurate or incomplete information, the decision to issue an enforcement action for the initial inaccurate or incomplete information normally will depend on the circumstances, including the ease of detection of the error, the timeliness of the correction, whether the NRC or the licensee or applicant 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 or applicant before the NRC relies on the information, or before the NRC raises 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 the information is corrected. However, if the initial submittal was accurate when made but later turns out to be erroneous because of newly discovered information or an advance in technology, a citation normally would not be appropriate if, when the new information became available or the advance in technology was made, the initial submittal was

greater than green, the licensee will normally be given an opportunity to meet with the NRC to exchange information related to that assessment. Because the significance assessment typically requires a determination as to whether violations occurred, a subsequent PEC is not normally required.

2.4.3 Alternative Dispute Resolution

The Administrative Dispute Resolution Act of 1996 (ADRA) authorizes and encourages the use of ADR by Federal agencies. ADR refers to a variety of processes that emphasize creative, cooperative approaches to handling conflicts in lieu of adversarial procedures. Mediation is the form of ADR typically used by the NRC. The use of ADR in the NRC's enforcement program is available for cases involving discrimination and other wrongdoing cases (which in some wrongdoing cases also include any nonwillful violation identified during an OI investigation) after the NRC OI has completed an investigation (i.e., postinvestigation ADR), and the NRC concludes that pursuit of an enforcement action appears warranted. Post-investigation ADR may also be used for discrimination violations based solely on a finding by DOL; however, the NRC will not negotiate the DOL finding. Individuals within the Commission's jurisdiction may also be offered ADR. Post-investigation ADR complements compliments, and works in conjunction with, the traditional NRC enforcement process. ADR may be offered (1) before a PEC, (2) after the initial enforcement action is taken (i.e., an NOV or proposed imposition of a civil penalty), or (3) with the imposition of a civil penalty and prior to a hearing request. Use of the post-investigation ADR program is voluntary for all parties, including the NRC; any participant may end the process at any time. Mediation activities are kept confidential in accordance with 5 U.S.C. § 574; however, the terms of the settlement agreement are normally formalized in a Confirmatory Order, which is published in the *Federal Register*. Normally, there is also a press release providing information about the settlement agreement.

In some circumstances, it may not be appropriate for the NRC to engage in post-investigation ADR (e.g., the U.S. Department of Justice has substantial involvement in the case, cases in which the subject matter is such that a Confirmatory Order detailing the terms of a settlement agreement cannot be made public, or other particularly egregious cases in which the public interest is not served by engaging in ADR). The approval of the Director, OE, is required in those cases where the staff proposes not to offer post-investigation ADR.

Additional information concerning the NRC's post-investigation ADR program is available in the NRC Enforcement Manual and on the NRC Web site.

In addition, an individual and his or her employer (or former employer) can use ADR to resolve discrimination complaints (under Section 211 of the ERA) before the initiation of investigative activities by OI (i.e., pre-investigation ADR, commonly referred to as "early ADR") (see NRC Management Directive 8.8, "Management of Allegations") or a licensee-sponsored ADR program that is similar in nature to the NRC's early ADR program. If the parties reach a settlement agreement using early ADR or licensee-sponsored ADR, the NRC subsequently reviews the agreement to ensure that it does not include any provisions in violation of the NRC's "Employee Protection" regulations. If no such restrictive provisions exist, the NRC will not investigate the discrimination complaint or take enforcement action.

the apparent violation will depend on the circumstances of the case, including the significance of the issue, the enforcement sanction that the NRC is contemplating, and whether the individual has already had an opportunity to respond to the apparent violation.

If the NRC discovers (through inspections or investigation-related material) potentially damaging or disqualifying information regarding an individual's trustworthiness and reliability, and the individual currently possesses Unescorted Access (UA) or is in the process of obtaining Unescorted Access Authorization (UAA), the NRC will consider, on a case-by-case basis, notifying the licensee that has granted, or is processing the UA or UAA of the information. This notification may occur in the preliminary or final determination stage of the enforcement process, as appropriate, with approval of the Director, OE. If the NRC makes such a notification, it nevertheless remains the licensee's responsibility to evaluate the information provided in accordance with its access authorization program to determine the appropriate actions regarding individual access authorizations. A licensee may reasonably reach a conclusion that the information provided by the NRC is not disqualifying under the circumstances (e.g., based on additional facts, based on a different assessment of the facts, or based upon the final resolution of the enforcement process).

Since it is NRC policy to hold licensees responsible for the acts of their employees and contractors, in most cases, the NRC will cite the licensee for violations committed by their employees and contractors. Violations with a significance that would typically warrant escalated enforcement action against the licensee may warrant an enforcement action against an individual (e.g., deliberately providing inaccurate or incomplete information or deliberate falsification of documents). Typically, the NRC will not take enforcement action against the employee or contractor if failures of licensee management (e.g., improper training or inadequate procedures) are responsible for the individual's improper actions. In deciding whether to issue enforcement actions both to a licensee and a nonlicensed individual, the NRC will make decisions on a case-by-case basis.

4.1 Considerations in Determining Enforcement Actions Involving Individuals

The NRC recognizes that decisions regarding enforcement actions against individuals will have to be made on a case-by-case basis. The NRC may propose an enforcement action or refrain from taking an enforcement action after considering all the relevant circumstances of each case.

The primary factors considered by the NRC in considering whether to take action or what action to take are (1) the significance of the underlying violation or technical issue (not considered in discrimination cases) and (2) the individual's position within the organization (i.e., notwithstanding an individual's job title, consider the position of the individual within the licensee's organizational structure and the individual's responsibilities related to the oversight of licensed activities and to the use of licensed material).

Other factors include, but are not limited to, whether the violation was the result of deliberate misconduct (typically a prerequisite for taking action against a nonlicensed individual), the benefit to the wrongdoer (e.g., direct personal or corporate gain), the degree of management responsibility or culpability, and the attitude of the wrongdoer (e.g., admission of wrongdoing, acceptance of responsibility).

4.3 Civil Penalties to Individuals

Except for individuals subject to civil penalties under Section 206 of the ERA, as amended, the NRC will not normally impose a civil penalty against an individual. However, Section 234 of the AEA gives the Commission authority to impose civil penalties on "any person." Furthermore, any person, whether or not a licensee of the Commission, who violates any regulations adopted under Section 147, "Safeguards Information," of the AEA will be subject to the full range of enforcement sanctions, including civil penalties. Section 11s of the AEA broadly defines "person" to include individuals, a variety of organizations, and their representatives or agents.

The NRC will typically issue a civil penalty to any individual who deliberately releases Safeguards Information (SGI), including SGI-M, regardless of whether that individual is employed by a licensee. If an individual deliberately released or failed to properly control SGI after employment ends with a licensee, the NRC will typically consider individual enforcement actions, including civil penalties.

The NRC will typically not issue a civil penalty to an individual for non-deliberate violations of SGI requirements if that individual's employer (a licensee, certificate holder, applicant for a license or a certificate of compliance, or contractor) places the violation in its corrective action program and has taken, or plans to take, corrective actions to restore compliance. The NRC will consider, based on the circumstances of a case, the appropriateness of a civil penalty for non-deliberate releases of SGI by an individual in which the employer failed to take or plan to take corrective actions and for cases involving deliberate or non-deliberate releases of SGI by an individual after employment has ended with a licensee.

The NRC considers an individual's reasons and potential motivations for disclosing SGI (e.g., lack of understanding or knowledge of the significance of the information, ~~economic gain, or expression of views~~) and the willingness of the individual to correct or mitigate the release of information in determining if a civil penalty is to be issued and in determining the final civil penalty amount. The NRC typically reserves civil penalties for cases involving egregious violations and for individuals who refuse to correct or mitigate the release of information. Table A in Section 8.0 of this Policy lists the base civil penalty to individuals who release SGI. The intent of civil penalties to individuals is to serve as a deterrent; these penalties generally do not require a base civil penalty as high as that issued to a licensee or contractor. However, willful violations may support a civil penalty outside of the range listed in Section 8.0.

Section 6.13, "Information Security," of this Policy provides examples of violations to help determine the severity levels of violations. Also, in determining the appropriate SL for the release of SGI, the NRC will consider the type of SGI information disclosed, its availability to the public, the damage or vulnerability that the information caused or may cause to the licensee that possessed ownership of the SGI, and the damage that the information caused or could cause to public health and safety. The NRC will also use SGI-related significance determination process (under the Reactor Oversight Process) information, when available, to inform the SL determination.

procedural error occurred, was determined to be any of the following:

- (a) unfit for duty as a result of a confirmed positive test for drugs or alcohol at cutoff levels established by the facility licensee,
 - (b) under the influence of any prescription or over-the-counter drug as described in 10 CFR 55.53(j),
 - (c) in noncompliance with a condition stated on the individual's license, or
 - (d) unfit for duty as determined by a post event fatigue assessment required by 10 CFR 26.211(a)(3);
2. A deliberate compromise (see 10 CFR 55.49, "Integrity of Examinations and Tests") occurs of an application, test, or examination required by 10 CFR Part 55, "Operators' Licenses," or inaccurate or incomplete information is deliberately provided to the NRC and has any of the following effects:
- (a) in the case of initial operator licensing, contributes to an individual being granted an operator or senior operator license, or
 - (b) in the case of operator requalification, contributes to an individual being permitted to continue to perform the functions of an operator or senior operator, or
 - (c) contributes to a medically unqualified individual performing the functions of a licensed operator or senior operator, or
3. A licensed operator or senior operator, while within the protected area, is involved in the use, sale, or possession of illegal drugs or the consumption of alcoholic beverages.

c. *SL III* violations involve, for example:

1. A licensed operator, or a senior operator actively performing the functions covered by that position, is determined to be any of the following:
 - (a) unfit for duty as a result of a confirmed positive test for drugs or alcohol at cutoff levels established by the licensee,
 - (b) under the influence of any prescription or over-the-counter drug as described in 10 CFR 55.53(j),
 - (c) in noncompliance with a condition stated on the individual's license, or
 - (d) unfit for duty as determined by a post event fatigue assessment required by 10 CFR 26.211(a)(3);

Operating Nuclear Power Reactors,” or 10 CFR Part 50, Appendix E, “Emergency Planning and Preparedness for Production and Utilization Facilities”) to responsible Federal, State, and local agencies, or

- (c) respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities, and augment shift staff).

b. SL II violations involve, for example:

1. During an actual Site Area Emergency, a licensee fails to promptly do any of the following:
 - (a) correctly classify and declare the event,
 - (b) make required notifications (i.e., notifications required by the licensee’s emergency plan, 10 CFR 50.72, or 10 CFR 50, Appendix E) to responsible Federal, State, and local agencies, or
 - (c) respond to the event (e.g., assess actual or potential offsite consequences, activate emergency response facilities, and augment shift staff);
2. A licensee loses its ability to meet or implement any regulatory requirement related to assessment (other than emergency classification) or notification¹⁰ such that the required function would not be implemented during the response to an actual emergency; or
3. An emergency action level (EAL) initiating condition (IC) has been rendered ineffective such that any General Emergency would not be declared for a particular off-normal event.¹¹

c. SL III violations involve, for example:

1. During an actual Alert emergency, a licensee fails to promptly do any of the following:
 - (a) correctly classify and declare the event,

¹⁰ As used in this example, “assessment” includes classification, assessment of the impact of a release of radioactivity, and the making of protective action recommendations; “notification” includes initial and followup notifications to offsite response organizations. For power reactors, this includes the risk-significant planning standards in 10 CFR 50.47(b)(4), (b)(5), (b)(9), and (b)(10). See Inspection Manual Chapter 0609, Appendix B, Emergency Preparedness Significance Determination Process, Section 5.0, for examples of conditions that may cause a required function not to be implemented or to be implemented in a degraded manner.

¹¹ An IC/EAL may be rendered ineffective by changes to facility procedures, systems, or equipment; errors in numeric thresholds; or any other cause that could result in an IC that should be declared not being declared in a timely and accurate manner following the change.

2. Export or import of nuclear equipment or materials in excess of the limits specified in a specific license or license amendment, when such activity would have been authorized by the NRC (or other authority); or
3. Unauthorized export of foreign-obligated material or equipment in violation of 10 CFR 110.50(b)(3) requirements.

7.0 GLOSSARY

This glossary, while not exhaustive, contains many of the terms commonly used throughout the NRC enforcement process.

Activity Area refers to the area of NRC-licensed activity that a licensee (or other person) engages in (e.g., radiography, reactor operations).

Actual Consequences include such effects as actual, exposures to workers or members of the public exceeding regulatory limits (e.g., 10 CFR 20.1201, "Occupational Dose Limits for Adults" and 10 CFR 20.1301, "Dose Limits for Individual Members of the Public"), onsite or offsite releases of material exceeding regulatory or license limits, accidental criticality, core damage, loss of significant safety barriers, and loss of control of radioactive material.

Adverse Action is any action that may adversely impact the compensation, terms, conditions, or privileges of employment including but not limited to a failure to receive a routine annual pay increase or bonus; demotion or arbitrary downgrade of a position; transfer to a position that is recognized to have a lesser status or be less desirable (e.g., from a supervisory to nonsupervisory position); failure to promote; overall performance appraisal downgrade; verbal or written counseling, or other forms of constructive discipline.

Alternative Dispute Resolution (ADR) refers to a variety of processes that emphasize creative, cooperative approaches to handling conflicts in lieu of adversarial procedures. Mediation and arbitration are the most widely recognized processes. The NRC's ADR program uses mediation rather than arbitration (i.e., the parties develop mutually agreeable corrective actions rather than being obligated by an arbitrator's decision).

Apparent Violation is a [\[situation\] or \[circumstance\]](#) issue that does not appear to meet NRC requirements and for which the NRC staff has not made a final enforcement determination.

Careless Disregard refers to situations in which an individual acts with reckless indifference to at least one of three things: (1) the existence of a requirement, (2) the meaning of a requirement, or (3) the applicability of a requirement. Careless disregard occurs when an individual is unsure of the existence of a requirement, the meaning of a requirement, or the applicability of the requirement to the situation, but nevertheless proceeds to engage in conduct that the individual knows may cause a violation. Although aware that the action might cause a violation, the individual proceeds without first ascertaining whether a violation would occur.

Certificate Holder is any person or entity that has been issued a certificate by the NRC. Certificate holders include, but are not limited to, those issued certificates in accordance with the requirements of [10 CFR](#) Parts 32, 71, or 76. For the purposes of this Policy, where not addressed specifically, Certificate Holders are typically handled the same as Licensees.

Civil Penalty is a monetary penalty that may be imposed for violations of (1) certain specified provisions of the AEA or supplementary NRC rules or Orders, (2) any requirements for which a license may be revoked, or (3) reporting requirements under Section 206 of the ERA.

Confirmatory Action Letter (CAL) is a letter confirming a licensee's or contractor's agreement to take certain actions to remove significant concerns regarding health and safety, safeguards, or the environment.

Confirmatory Order is an Order that confirms the commitments made by a licensee or individual to take certain actions. Before issuance of the Confirmatory Order, the licensee or individual and the NRC mutually agree on the terms of the Order.

Contractor, as used in this Policy, includes vendors who supply products or services to be used in an NRC-licensed facility or activity.

Corrective Action Program is a licensee's process for tracking, evaluating, and resolving deficiencies.

Deliberate Misconduct occurs when an individual voluntarily and intentionally (1) engages in conduct that the individual knows to be contrary to a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant for a license, or a contractor or subcontractor of a licensee or applicant for a license or (2) provides materially inaccurate or incomplete information to a licensee, applicant for a license, or a contractor or subcontractor of a licensee or applicant for a license.

Demand for Information (DFI), as defined in [10 CFR](#) 2.204, is an Order requiring a licensee or other person subject to the jurisdiction of the Commission to respond with specific information for the purpose of enabling the NRC to determine whether an Order should be issued or whether other action should be taken.

Discrimination, as described in [10 CFR](#) 10 CFR 50.7 (or similar provisions in [10 CFR](#) Parts 30, 40, 52, 60, 61, 63, 70, 71, 72, and 76), is the taking of an adverse action against an employee because the employee engaged in certain protected activities.

Escalated Enforcement Actions include SL I, II, and III NOVs; NOVs associated with an inspection finding that the SDP evaluates as having low to moderate (white) or greater safety significance; civil penalties; NOVs to individuals; Orders to modify, suspend, or revoke NRC licenses or the authority to engage in NRC-licensed activities; and Orders issued to impose civil penalties.

Event, as used in this Policy, means (1) an occurrence characterized by an active adverse impact on equipment or personnel, readily obvious by human observation or instrumentation, or

(2) a radiological impact on personnel or the environment in excess of regulatory limits, such as an overexposure, a release of radioactive material above NRC limits, or a loss of radioactive material. For example, an equipment failure discovered through a spill of liquid, a loud noise, the failure of a system to respond properly, or an annunciator alarm would be considered an event; a system discovered to be inoperable through a document review would not. Similarly, if a licensee discovers, through quarterly dosimetry readings, that employees had been inadequately monitored for radiation, the issue would normally be considered licensee identified; however, if the same dosimetry readings disclose an overexposure, the issue would be considered an event.

Fuel Cycle is the series of steps involved in supplying fuel for nuclear power reactors. It can include mining, milling, isotopic enrichment, fabrication of fuel elements, use in a reactor, chemical reprocessing to recover the fissionable material remaining in the spent fuel, reenrichment of the fuel material, refabrication into new fuel elements, waste disposal, storage, and transportation.

Impacts the NRC's Ability To Perform Its Regulatory Function refers to a situation that prevents the NRC from using appropriate regulatory tools to address a noncompliance because the Agency is unaware that the noncompliance exists (e.g., provision of inaccurate and incomplete information or failure to submit a required report).

License Applicant, as used in this statement of policy, means any person who submits an application for review.

Licensee is any person or entity authorized to conduct activities under a license issued by the NRC. Licensees include, but are not limited to, facilities licensed under [10 CFR](#) Parts 30-36, 39, 40, 50, 52, 60, 61, 63, 70 or 72.

Licensee Official, as used in this statement of policy, in general, means a first-line supervisor or above, a licensed individual, a radiation safety officer, or an authorized user of licensed material whether or not listed on a license. Notwithstanding an individual's job title, the NRC will consider the individual's responsibilities relative to the oversight of licensed activities and the use of licensed material.

Licensed Reactor Operator, as used in this Policy, includes NRC licensed reactor operators (ROs) and NRC licensed senior reactor operators (SROs).

Lost Source Policy is the NRC's policy that a civil penalty may be issued for violations resulting in regulated source material being out of the control of the licensee regardless of the use, license type, quantity, or type of regulated material (e.g., loss, abandonment, improper transfer, or improper disposal of regulated material).

Minor Violation is a violation that is less significant than a SL IV violation. Minor violations do not warrant enforcement action and are not normally documented in inspection reports. However, minor violations must be corrected.

Noncited Violation (NCV) is a nonrecurring, typically nonwillful, SL IV violation that is not subject to formal enforcement action if, for a reactor licensee, the licensee places the violation in

a corrective action program to address recurrence and restores compliance within a reasonable period of time and, for all other licensees, the licensee corrects or commits to correcting the violation within a reasonable period of time.

Nonescalated Enforcement Actions include NOVs that are dispositioned by the NRC as SL IV or minor violations.

Nonlicensee includes, but is not limited to, applicants, contractors, subcontractors, and vendors.

Notice of Deviation (NOD) is a written notice describing a licensee's failure to satisfy a commitment where the commitment involved has not been made a legally binding requirement. An NOD requests that a licensee provide a written explanation or statement describing corrective steps taken (or planned), the results achieved, and the date when corrective action will be completed.

Notice of Nonconformance (NON) is a written notice describing the failure of a licensee's contractor to meet commitments that have not been made legally binding requirements by the NRC (e.g., a commitment made in a procurement contract with a licensee or applicant as required by 10 CFR Part 50, Appendix B). (If the contractor deliberately fails to meet the terms of a procurement contract, the NRC may issue a violation under the Deliberate Misconduct Rule in 10 CFR 50.5.) NONs request that nonlicensees provide written explanations or statements describing corrective steps (taken or planned), the results achieved, the dates when corrective actions will be completed, and measures taken to preclude recurrence.

Notice of Violation (NOV) is a written notice setting forth one or more violations of a legally binding requirement (see 10 CFR 2.201).

Order is used to modify, suspend, or revoke a license, or to take other action against a licensee or other person subject to the jurisdiction of the Commission (see 10 CFR 2.202).

Potential Safety or Security Consequences include potential outcomes based on realistic and credible scenarios (i.e., the staff considers the likelihood that safety or security could have been negatively impacted under these scenarios).

Predecisional Enforcement Conference (PEC) is normally conducted with a licensee or individual before the NRC makes an enforcement decision when escalated enforcement action may warranted (i.e., SL I, II, or III violations, civil penalties, or Orders). The purpose of a PEC is to obtain information that will assist the NRC in determining the appropriate enforcement action, if any.

Regulatory Conference is conducted with a reactor licensee to discuss the significance of findings evaluated through the SDP, with or without associated violations. These meetings focus on the safety significance of the issues and not necessarily on the corrective actions associated with the issues. Because the significance assessment from the SDP determines whether escalated enforcement action will be taken, a subsequent PEC is not normally necessary.

9.0 INTERIM ENFORCEMENT POLICIES

9.1 Enforcement Discretion for Certain Fire Protection Issues (10 CFR 50.48)

This section sets forth the interim Enforcement Policy that the NRC will follow to exercise enforcement discretion for certain noncompliances with the requirements in 10 CFR 50.48, "Fire Protection," (or fire protection license conditions) that are identified as a result of the transition to a new risk-informed, performance-based fire protection approach included in 10 CFR 50.48(c) and for certain existing identified noncompliances that reasonably may be resolved by compliance with 10 CFR 50.48(c). Paragraph (c) allows reactor licensees to voluntarily comply with the risk-informed, performance-based fire protection approaches in National Fire Protection Association Standard 805 (NFPA 805), "Performance-Based Standard for Fire Protection for Light Water Reactor Electric Generating Plants," 2001 Edition (with limited exceptions stated in the rule language).

For those noncompliances identified during the licensees' transition process, this enforcement discretion policy will be in effect for up to 3 years from the date specified by the licensee in its letter of intent to adopt the requirements in 10 CFR 50.48(c). This enforcement discretion will continue to be in place until the NRC disposes the licensee's amendment request to transition to 10 CFR 50.48(c). The Agency will use NRR Office Instruction LIC-109, "Acceptance Review Procedures," (Agencywide Documents Access and Management System (ADAMS) Accession No. ML081200811), to process the license amendment request (LAR). If the amendment is acceptable for review, enforcement discretion will continue to be in place, without interruption, until the NRC disposes the LAR. If the amendment is unacceptable with opportunity to supplement, the enforcement discretion will continue while the staff reviews the amendment. If after receipt of the supplemental information, the amendment is determined to be acceptable for review, enforcement discretion will continue until the NRC decides the disposition of the amendment. The NRC will determine the disposition of submittals that are not acceptably supplemented, or submittals initially characterized as unacceptable with no opportunity to supplement, in accordance with normal enforcement practices.

The NRC may grant an additional period of enforcement discretion on a case-by-case basis, if a licensee has made substantial progress in its transition effort. This additional period of discretion, if granted, would end 6 months after the date of the safety evaluation approving the second pilot plant¹⁴ LAR review. The NRC will assess "substantial progress" based on accomplishment of tasks that are not resource limited with respect to technical expertise in fire probabilistic risk assessment (e.g., classical fire protection transition, deterministic nuclear safety performance criteria transition, nonpower operational transition, radioactive release transition, development of the NFPA 805 monitoring program, operator manual action transition to NFPA 805 recovery actions). In order for the NRC to adequately evaluate the transition progress, licensees that request enforcement discretion beyond the 3 years currently available should make their request to the NRC in writing at least 3 months before the expiration of the 3-year discretion period and compile or submit the following information:

¹⁴ The NRC accepted the request from both Duke Power (ADAMS Accession No. ML051080005) and Progress Energy (ML052140391) to allow Oconee Nuclear Power Station and Shearon Harris Nuclear Power Station, respectively, to become pilot NFPA 805 plants.

After December 31, 2005, 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. However, licensees that submitted letters of intent to transition to 10 CFR 50.48(c) with existing noncompliances will have the option to implement corrective actions in accordance with the new performance-based regulation. The NRC will exercise all other elements of the assessment and enforcement process even if the licensee submitted its letter of intent before the NRC issues its enforcement action for existing noncompliances.

10.0 PAPERWORK REDUCTION ACT STATEMENT and PUBLIC PROTECTION NOTIFICATION

Paperwork Reduction Act Statement

This policy statement contains information collection requirements that are subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). These information collections were approved by the Office of Management and Budget (OMB), approval number 3150-0136. This policy statement references additional mandatory and voluntary information collections approved by OMB, approval numbers 3150-0002, 3150-0007, 3150-0008, 3150-0009, 3150-0010, 3150-0011, 3150-0013, 3150-0014, 3150-0016, 3150-0017, 3150-0018, 3150-0032, 3150-0035, 3150-0036, 3150-0104, 3150-0146, 3150-0151, 3150-0158, 3150-0195.

The burden to the public for the voluntary information collections approved under clearance number 3150-0136 is estimated to average 166 hours per NOED request and 40 hours per NFPA 805 letter of intent, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the information collection. The information provided in a NOED request is needed for the NRC to determine if the exercise of enforcement discretion is clearly consistent with protecting the public health and safety. The information in a letter of intent to transition to NFPA 805 is needed to determine when the licensee's three years of enforcement discretion begins. Send comments regarding this burden estimate or any other aspect of these information collections, including suggestions for reducing the burden, to the Information Services Branch (T-5 F53), U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, or by email to Infocollects.Resource@nrc.gov; and to the Desk Officer, Office of Information and Regulatory Affairs, NEOB-10202, (3150-0136), Office of Management and Budget, Washington, DC 20503.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

Edits to FRN

II. Background

The purpose of this Policy revision is: 1) to incorporate changes directed by the Commission in Staff Requirements Memorandum-SECY-09-0190; 2) to make other changes proposed and evaluated by the staff; and 3) to make minor edits.

On December 30, 2009, in SECY-09-0190 (ADAMS Accession No. ML093200520), the NRC staff submitted to the Commission a proposed major revision of the Enforcement Policy. In SECY-09-0190, the NRC staff committed to provide an opportunity for public comments on the revision after it had been in effect for about 18 months. In Staff Requirements Memorandum-SECY-09-0190, the Commission approved the revised Policy and directed the NRC staff to evaluate certain items for inclusion in the next proposed revision to the Policy. On September 30, 2010, the NRC published the revised Policy in the *Federal Register* (75 FR 60485).

In addition to the direction given to the NRC staff in Staff Requirements Memorandum-SECY-09-0190, the NRC staff evaluated other Policy changes that were presented to the Commission for approval and inclusion in the 2012 Policy revision.

The NRC staff solicited comments on proposed changes to the Policy in documents published in the *Federal Register* on September 6, 2011 (76 FR 54986) and December 6, 2011 (76 FR 76192).

III. Summary of Substantive Changes to the Enforcement Policy

1. Credit for Fuel Cycle Licensee Corrective Action Programs

The NRC is revising Section 2.3.2, Non-Cited Violation, to provide fuel cycle licensees (and all other licensees or nonlicensees) with credit for a corrective action program (CAP) for certain severity level (SL) IV violations. Presently, this CAP credit for certain SL IV violations is only available to power reactor licensees. This revision would allow fuel cycle licensees (and all

The NRC is also adding a new section (i.e., Section 4.3.1, Civil Penalties to Individuals Who Release Safeguards Information) to provide an assessment tool for the NRC staff to determine civil penalties for violations of unauthorized release of safeguards information (SGI) by individuals ~~who release safeguards information (SGI)~~. The NRC is also revising Section 8.0, Table of Base Civil Penalties, to include a base civil penalty of \$3,500 for individuals who release SGI.

4. Orders

The NRC is revising Section 2.3.5, Orders, to clarify that Orders may be immediately effective, without prior opportunity for a hearing, whenever the NRC determines that the public health, safety interest, or common defense and security so requires, or if the violation or conduct causing the violation is willful.

5. Inaccurate and Incomplete Information

The NRC is adding a new Section 2.3.11, Inaccurate and Incomplete Information, to provide guidance to the NRC staff for issues involving inaccurate and incomplete information. The wording for this new section is taken essentially verbatim from the November 28, 2008, version of the Policy, Section IX, Inaccurate and Incomplete Information. This section was not included in the September 30, 2010, revision to the Policy.

6. Reporting of Defects

The NRC is adding a new Section 2.3.12, Reporting of Defects and Noncompliance, to provide guidance to the NRC staff for issues involving contractors that supply products or services for use in nuclear activities. The wording for this new section is taken essentially verbatim from the November 28, 2008, version of Policy, Section X, Enforcement Action Against Nonlicensees. This section was not included in the September 30, 2010, revision to the Policy.

7. Predecisional Enforcement Conference

The NRC is revising Section 2.4.1, Predecisional Enforcement Conference, in its entirety to provide clear and consistent guidance that allows licensees and individuals to respond to

8. Alternative Dispute Resolution

The NRC is revising Section 2.4.3, Alternative Dispute Resolution, to update the alternative dispute resolution guidance.

9. Enforcement Actions Involving Individuals

The NRC is revising Section 4.0, Enforcement Actions Involving Individuals, to provide guidance for handling potentially damaging or disqualifying information involving an individual's trustworthiness and reliability, which may affect an individual's unescorted access authorization to licensee facilities.

10. Violation Examples

The NRC is revising Section 6.0, Violation Examples, by adding several new violation examples and revising several of the current examples. The sub-sections within Section 6.0 that are being revised include the violation examples related to licensed operators, facility construction (Title 10 of the *Code of Federal Regulations* (10 CFR) Parts 50 and 52 licensees and fuel cycle facilities), emergency preparedness, inaccurate and incomplete information, and failure to make a required report. The NRC is adding violation examples related to export and import activities.

11. Glossary

The NRC is revising the following definitions in Section 7.0, Glossary: actual consequences, apparent violation, lost source policy, substantial potential for exposures or releases in excess of the applicable limits in 10 CFR Part 20, and traditional enforcement. The NRC is also adding definitions for certificate holders and nonlicensees for purposes of the Policy.

12. Table of Base Civil Penalties

In Section 8.0, Table of Base Civil Penalties, Table A, the NRC is revising the title of Category "c" by replacing the wording "Fuel fabricators authorized to possess Category III

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Commissioner Apostolakis
SUBJECT: SECY-12-0047 – REVISIONS TO THE NUCLEAR
REGULATORY COMMISSION ENFORCEMENT
POLICY

Approved X Disapproved Abstain

Not Participating

COMMENTS: Below X Attached X None

I approve publication of the revised Enforcement Policy, the *Federal Register* Notice, and the staff's recommendation for base civil penalties for uranium conversion facilities, subject to the attached edit which was proposed by former Chairman Jaczko and the edits proposed by Commissioner Ostendorff.



SIGNATURE

8/27/12

DATE

Entered on "STARS" Yes No

NRC Enforcement Policy

corrective action for the present violation or problem is reasonably prompt and comprehensive (see the discussion under Section 2.3.4.c, below). Using 2 years as the basis for assessment is expected to cover most situations, but considering a slightly longer or shorter period may be warranted based on the circumstances of a particular case. For a licensee-identified violation or an event, the starting point of this period is when the licensee becomes aware that a problem or violation exists that requires corrective action. For an NRC-identified violation, the starting point is when the NRC put the licensee on notice of the need to take corrective action for the previous violation, which could be during the inspection, at the inspection exit meeting, or as part of post inspection communication with the licensee. The 2 year period typically ends on the date of the second violation.

b. Should the licensee be given credit for actions related to identification of the violation? A stated purpose of this Policy is to encourage prompt identification of violations of NRC requirements. While the decision regarding credit for identification can become complicated, the overarching consideration is whether the NRC should give credit for a licensee's efforts to identify the violation. It is the responsibility of the licensee to bring information on efforts to identify the violation to the attention of the NRC. The NRC will not undertake an inquiry to obtain information on whether ~~demonstrate such identification effort. It is not the NRC's responsibility to show that~~ identification credit is ~~not warranted.~~

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1. The civil penalty assessment should normally consider the factor of identification, in addition to corrective action (see the discussion in Section 2.3.4.c, below). In these circumstances, the NRC should consider whether the licensee should be given credit for actions related to identification when any of the following conditions exist:

- (a) the violation is a SL I or II
- (b) the violation is a willful SL III
- (c) the licensee has been issued at least one other escalated action during the past 2 years or 2 inspections, whichever is longer.

In each case, the decision should be focused on identification of the problem requiring corrective action. In other words, although giving credit for identification and corrective action should be separate decisions, the concept of identification presumes that the identifier recognizes the existence of a problem and understands that corrective action is needed. The decision on identification requires considering all the circumstances of identification including the following:

- (a) whether the problem requiring corrective action was identified by the NRC, identified by the licensee, or revealed through an event
- (b) whether prior opportunities existed to identify the problem requiring corrective action, and if so, the age and number of those opportunities

AFFIRMATION ITEM

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: COMMISSIONER MAGWOOD
SUBJECT: SECY-12-0047- REVISIONS TO THE NUCLEAR
REGULATORY COMMISSION ENFORCEMENT
POLICY

Approved Disapproved _____ Abstain _____

Not Participating _____

COMMENTS: Below Attached None _____

I approve publication of the revised Enforcement Policy, the *Federal Register* Notice, and the staff's recommendation for base civil penalties for uranium conversion facilities, subject to the edits proposed by Commissioner Ostendorff and Commissioner Apostolakis and the attached additional comments.



SIGNATURE

22 October 2012

DATE

Entered on "STARS" Yes No _____

**Commissioner Magwood's Comments on SECY-12-0047,
Revisions to the Nuclear Regulatory Commission Enforcement Policy**

I approve publication of the revised Enforcement Policy, the *Federal Register* Notice, and the staff's recommendation for base civil penalties for uranium conversion facilities, subject to the edits proposed by Commissioner Ostendorff and Commissioner Apostolakis and the additional comments below.

The Enforcement Policy is a vital regulatory tool. However, in order to be effective, it must clearly explain the Commission's standards and procedures for taking enforcement actions. One topic on which I am concerned the revised Enforcement Policy misses this mark is issuance of civil penalties to individuals for the release of Safeguards Information. Release of SGI information is a serious offense with real and potentially devastating security and safety consequences. Therefore, it is imperative that the Enforcement Policy make clear that deliberate release of SGI that could compromise public safety and security will be met with sanctions. Unfortunately, the proposed revisions do not make this clear. As written, the revised Enforcement Policy would leave the agency to dither over the politics of who did what and why instead of drawing a clear line and setting clear consequences. Given the potential stakes, this is unacceptable, and the staff should rework this section to establish a clear, unambiguous position by the agency that deliberate releases of SGI are unacceptable and will not be tolerated.

The Enforcement Policy should also reflect the current state of the regulations. In this regard, I am concerned that section 6.7, "Health Physics" does not reflect the most up-to-date dose standards. During the next revision of the Enforcement Policy, the staff should revise this section to bring the standards referenced in this section as sources of potential violations into greater alignment with the agency's Part 20 dose limits.

In addition to the current revisions to the Enforcement Policy, the staff notes in the SECY paper that it intends during the next revision to consider the merits and potential implications with regard to issuing civil penalties to individuals and of issuing orders banning individuals from NRC-licensed activities for a period of time less than one year. Although I recognize that the staff has not yet completed its full analysis of the issue, I do not support the consideration of permitting issuance of individual bans of less than one year. The current process is understood to have a high bar over which staff's assessment must show willfulness and clear intent. Allowing bans of a few months suggest that staff will engage in Solomon-like judgments of the severity of deceptions based on increasingly subjective criteria and applied more liberally than is the case today. The clarity of the current approach should be preserved and this tool used only sparingly.



William D. Magwood, IV 10/22/12
Date

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary
FROM: Commissioner Ostendorff
SUBJECT: SECY-12-0047 – REVISIONS TO THE NUCLEAR
REGULATORY COMMISSION ENFORCEMENT
POLICY

Approved X Disapproved _____ Abstain _____

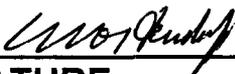
Not Participating _____

COMMENTS: Below X Attached X None _____

I approve publishing the 2012 revised Enforcement Policy, including the proposed Federal Register Notice and the recommended base civil penalty for uranium conversion facilities, subject to the attached edits.

The NRC's enforcement actions are important to the agency's mission in that they both deter noncompliance and encourage prompt identification and correction of violations. These actions also have direct and personal impacts on licensees and their employees. It is therefore critical that the agency carefully weigh all of the relevant factors before taking enforcement actions. For this reason, I have proposed edits to the sections of the policy dealing with issuance of daily civil penalties and the provision of information related to an individual's trustworthiness and reliability to licensees. First, in accordance with the staff's recommended resolution of a public comment, the Policy should state that the staff will consult with the Commission before issuing daily civil penalties. Secondly, the Policy should clarify that the staff should consider the certainty of information that is potentially damaging to an individual before communicating it to licensees. These provisions will act as "backstops" to ensure that relevant issues are fully vetted before the agency takes action.

I appreciate the staff's efforts to update the Policy based on experience in implementing the 2010 revisions, as well as the public comments solicited on the proposed revisions and the changes to the Policy made in 2010.



SIGNATURE

4/23/12

DATE

Entered on "STARS" Yes X No _____

NRC Enforcement Policy

proposed sanction. Specific enforcement actions requiring prior Commission notification and consultation include, but are not limited to, the following:

- a. Enforcement Actions Requiring Written Notification to the Commission:
 1. all enforcement actions involving civil penalties or Orders
 2. all notices of enforcement discretion involving natural events, such as severe weather conditions
 3. the first time that discretion is exercised for a plant that meets the criteria of Section 3.1, "Violations Identified during Extended Shutdowns or Work Stoppages"
 4. where appropriate, based on the uniqueness or significance of the issue, when discretion is exercised for violations that meet the criteria of Section 3.5, "Violations Involving Special Circumstances"

- b. Enforcement Actions Requiring Advance Consultation with the Commission:
 1. an action affecting a licensee's operation that requires balancing the public health and safety or common defense and security implications of not operating against the potential radiological or other hazards associated with continued operation
 2. proposals to impose a civil penalty for a single violation or problem that is greater than 3 times the Severity Level I value shown in Table A of Section 8.0 for that class of licensee
 3. any proposed enforcement action that involves a SL I violation
 4. any action that the EDO believes warrants Commission involvement
 5. any proposed enforcement case involving an Office of Investigations (OI) report where the NRC staff (other than the OI staff) does not arrive at the same conclusions as those in the OI report concerning issues of intent if the Director, OI, concludes that Commission consultation is warranted
 6. any proposed enforcement action on which the Commission asks to be consulted
 7. [any proposals to use discretion to impose a daily civil penalty](#)

NRC Enforcement Policy

the apparent violation will depend on the circumstances of the case, including the significance of the issue, the enforcement sanction that the NRC is contemplating, and whether the individual has already had an opportunity to respond to the apparent violation.

If the NRC discovers (through inspections or investigation-related material) potentially damaging or disqualifying information regarding an individual's trustworthiness and reliability, and the individual currently possesses Unescorted Access (UA) or is in the process of obtaining Unescorted Access Authorization (UAA), the NRC will consider, on a case-by-case basis, notifying the licensee that has granted, or is processing the UA or UAA of the information. This notification may occur in the preliminary or final determination stage of the enforcement process, as appropriate, with approval of the Director, OE. The NRC will strongly consider the degree of certainty associated with the information in making this decision. If the NRC makes such a notification, it nevertheless remains the licensee's responsibility to evaluate the information provided in accordance with its access authorization program to determine the appropriate actions regarding individual access authorizations. A licensee may reasonably reach a conclusion that the information provided by the NRC is not disqualifying under the circumstances (e.g., based on additional facts, based on a different assessment of the facts, or based upon the final resolution of the enforcement process).

Since it is NRC policy to hold licensees responsible for the acts of their employees and contractors, in most cases, the NRC will cite the licensee for violations committed by their employees and contractors. Violations with a significance that would typically warrant escalated enforcement action against the licensee may warrant an enforcement action against an individual (e.g., deliberately providing inaccurate or incomplete information or deliberate falsification of documents). Typically, the NRC will not take enforcement action against the employee or contractor if failures of licensee management (e.g., improper training or inadequate procedures) are responsible for the individual's improper actions. In deciding whether to issue enforcement actions both to a licensee and a nonlicensed individual, the NRC will make decisions on a case-by-case basis.

4.1 Considerations in Determining Enforcement Actions Involving Individuals

The NRC recognizes that decisions regarding enforcement actions against individuals will have to be made on a case-by-case basis. The NRC may propose an enforcement action or refrain from taking an enforcement action after considering all the relevant circumstances of each case.

Field Code Changed

The primary factors considered by the NRC in considering whether to take action or what action to take are (1) the significance of the underlying violation or technical issue (not considered in discrimination cases) and (2) the individual's position within the organization (i.e., notwithstanding an individual's job title, consider the position of the individual within the licensee's organizational structure and the individual's responsibilities related to the oversight of licensed activities and to the use of licensed material).

Other factors include, but are not limited to, whether the violation was the result of deliberate misconduct (typically a prerequisite for taking action against a nonlicensed individual), the benefit to the wrongdoer (e.g., direct personal or corporate gain), the degree of management responsibility or culpability, and the attitude of the wrongdoer (e.g., admission of wrongdoing, acceptance of responsibility).

3. A licensee fails to complete or maintain more than one of the requirements of a program for individuals listed in 10 CFR 26.4, "FFD Program Applicability to Categories of Individuals;"
 4. A licensee fails to develop and maintain records concerning the denial of access or to respond to inquiries concerning denials of access so that, as a result of the failure, a person previously denied fitness-for-duty authorization is improperly granted such access;
 5. A licensee's EAP staff fails to notify licensee management when the EAP staff is aware that an individual's condition may adversely affect the safety or security of the facility; or
 6. A individual covered by 10 CFR Part 26, Subpart I, involved in a human error that caused or contributed to an actual event or a potential degradation of the level of safety of the plant, who at the time the error occurred, was determined to be fatigued as a result of a fatigue assessment as defined in 10 CFR 26.211.
- d. SL IV violations involve, for example:
1. A licensee fails to have implementing procedures that are clear, concise, and readily available;
 2. A licensee fails to take an action required by the licensee's behavior observation program in cases that do not amount to a SL I, II, or III violation; or
 3. Failures to appropriately implement any of the requirements (e.g., work hours, waivers, self declarations, or fatigue assessment) of 10 CFR Part 26, Subpart I that are ~~not~~ isolated or that do not demonstrate programmatic weaknesses in implementation.

6.15 Export and Import Activities

Several of the following violation examples involve deliberateness or careless disregard. For those examples, the normal Enforcement Policy process for discretion to potentially escalate the severity level of the violation based on willfulness is not necessary.

- a. SL I violations involve, for example:
1. Deliberate misrepresentation of facts, with the knowledge of a licensee official, that led to the export of licensable and sensitive equipment or material in quantities of concern to a destination that, if represented accurately, would not have been authorized by the NRC (or other authority); or