

NUCLEAR REGULATORY COMMISSION

ORIGINAL

COMMISSION MEETING

RETURN TO SECRETARIAT RECORDS

---

---

In the Matter of: DISCUSSION OF NRC ENFORCEMENT POLICY

---

---

DATE: October 28, 1981 PAGES: 1 - 77  
AT: Washington, D. C.

RETURN TO SECRETARIAT RECORDS

ALDERSON  REPORTING

400 Virginia Ave., S.W. Washington, D. C. 20024

Telephone: (202) 554-2345

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

- - -

DISCUSSION OF NRC ENFORCEMENT POLICY

- - -

Room 1130  
1717 H Street, N.W.  
Washington, D.C.  
Wednesday, October 28, 1981

The meeting was convened, pursuant to notice, at  
10 10:40 a.m.

BEFORE:

NUNZIO J. PALLADINO, Chairman  
VICTOR GILINSKY, Commissioner  
PETER A. BRADFORD, Commissioner  
JOHN F. AHEARNE, Commissioner  
THOMAS M. ROBERTS, Commissioner

STAFF PRESENT:

LEONARD BICKWIT, General Counsel  
FORREST REMICK, Chief, Office of Policy Evaluations  
\*CHILK  
DIRCKS  
D. THOMPSON  
V. STELLO  
R. DE YOUNG  
J. MURRAY  
J. KEPPLER  
J. FOUCHARD

# DISCLAIMER

This is an unofficial transcript of a meeting of the United States Nuclear Regulatory Commission held on October 28, 1981 in the Commission's offices at 1717 H Street, N. W., Washington, D. C. The meeting was open to public attendance and observation. This transcript has not been reviewed, corrected, or edited, and it may contain inaccuracies.

The transcript is intended solely for general informational purposes. As provided by 10 CFR 9.103, it is not part of the formal or informal record of decision of the matters discussed. Expressions of opinion in this transcript do not necessarily reflect final determinations or beliefs. No pleading or other paper may be filed with the Commission in any proceeding as the result of or addressed to any statement or argument contained herein, except as the Commission may authorize.



1 that I recognized when I went into this job, that we really  
2 needed to set from an overall point of view a policy for  
3 enforcement that represented to the best measure we could  
4 the policy that the Commission wanted the office to follow.  
5 And I view this document as in fact that policy and it would  
6 be used for that purpose, as the guidance of the Commission  
7 for what we ought to do.

8           Following the preparation of the interim report  
9 and policy, it has been used that was published last October  
10 as interim guidance and was used in that way, there are a  
11 number of things the Commission asked us to do. One of  
12 those was to have considerable public impact from meetings  
13 that we had throughout the country, that would really have  
14 an opportunity to tell us what they thought about our  
15 enforcement policy.

16           And we did in fact have those meetings, and had an  
17 extensive comment period, which was extended to allow for  
18 further comment.

19           The next slide, slide 2 --

20           (Slide.)

21           -- summarizes the significant comments that were  
22 received, and the attachment we sent to the Commission is an  
23 identification of the overall comments that were passed on  
24 to us. I think that the prevailing comment that came  
25 through was that the overall tone was too hostile and

1 unnecessarily adversarial.

2 COMMISSIONER GILINSKY: Did you get comments of  
3 the inspectors as well, our own inspectors?

4 MR. STELLO: Several times in the process the  
5 draft of the document was distributed throughout the  
6 regions, to collect from their management processes the  
7 views of the whole regional offices, getting comments from  
8 everyone in the office to the extent that we need it.

9 I am not suggesting that each individual inspector  
10 commented on it.

11 MR. KEPPLER: I can tell you in Region III we  
12 actively talked about it.

13 COMMISSIONER AHEARNE: Are they kind of factored  
14 into this final document?

15 MR. KEPPLER: They're factored into the document  
16 to the extent that I influenced it.

17 MR. STELLO: I won't attempt to go through each of  
18 these by themselves. The central comment was there was a  
19 fear of having rigidity and finally getting promulgated as a  
20 rule and a regulation for which there would be little or no  
21 flexibility on behalf of the decisionmaker to take into  
22 account the specific facts, and would lose the kind of  
23 flexibility that our policy can have and in this case must  
24 have.

25 Because as you know from our discussions on

1 enforcement actions in the past, it is not an easy matter to  
2 deal with and it should in fact retain the flexibility, and  
3 it is the recommendation to go forward with the policy as a  
4 policy and incorporate it into the regulations in that way.

5           COMMISSIONER AHEARNE: Do you see any difficulty  
6 in getting at some point so much flexibility that you lose  
7 what you were hoping for originally, a set of guidelines  
8 that would be relatively well understood both by our own  
9 people and the licensees?

10           MR. STELLO: I think that is a concern. I don't  
11 think we did that, though. I think we still have sufficient  
12 guidance in here, obviously far more than anything we ever  
13 had. So I think it's a good balance.

14           But that flexibility, I want to emphasize, is a  
15 very important aspect of it and it is there.

16           The next slide --

17           COMMISSIONER GILINSKY: Could you explain the  
18 third item?

19           MR. STELLO: That's something I was going to come  
20 to a little later. If the licensee identifies an issue, the  
21 way the civil penalty had been constructed in the interim  
22 policy, it still had the overriding -- the impression  
23 created by our action, as going counter would cause people  
24 to not bring up items; if there was a valve open and they  
25 knew if they told someone it was open that there was going

1 to be a big harassment over it, and it became a major  
2 problem and a major flap and big civil penalties, that it  
3 might create an incentive for the employee to just go ahead  
4 and close the valve and not say anything, and that we would  
5 not find problems of noncompliance, and that the environment  
6 and the incentive was counter, and that was one of the major  
7 things I'll be coming back to that was reflected in the  
8 policy.

9 (Slide.)

10 The third slide. Let me continue the point I was  
11 just discussing a moment ago, because I think that is one of  
12 the major changes that was made in the enforcement policy,  
13 and that is to allow for licensee-identified items of  
14 noncompliance, that if those items were so identified and  
15 the licensee had done all the things -- he properly  
16 identified and reported it, he took the kind of  
17 comprehensive correction action that we want him to take to  
18 prevent the occurrence, the operational history was  
19 favorable, there were no prior notices of similar events,  
20 and it is not clearly something for which there has been a  
21 variety of previous occurrences -- taking all of these  
22 things into account would allow us then to fully mitigate  
23 for those circumstances, not to impose any civil penalty if  
24 that in fact were the case.

25 I think that is a very important feature in the



1 new policy, because it does send, I think, the correct  
2 message to provide an environment in which people will want  
3 to find and report things to us, and do it quickly and  
4 effectively; and when they do, there is, if you will, a  
5 report for doing it.

6           Of course, equally so the same factors, taken into  
7 account, will allow us to escalate the civil penalty by a  
8 factor of 100 percent when things have not gone well, to go  
9 all the way up to the full authority we have, \$100,000 for  
10 the instance. So if a poor job has in fact been done or if  
11 we find it, one of our inspectors rather than the licensee,  
12 and it comes to us through that kind of a vehicle, then we  
13 have the exercise of considerable muscle.

14           So it's providing the environment both ways. If  
15 they don't find it and we do, it's going to hurt much  
16 worse. And if they do a good job of finding it and  
17 correcting it, there will be no civil penalty.

18           CHAIRMAN PALLADINO: Is that categorical or there  
19 might be circumstances under which you would consider a  
20 civil penalty even though maybe the reporting came through  
21 --

22           COMMISSIONER AHEARNE: It's flexible.

23           CHAIRMAN PALLADINO: You made the statement sound  
24 so categorical. That's why I raised the question.

25           MR. STELLO: What I said is that everything was

1 very favorable with respect to every one of the elements I  
2 mentioned, and then at that time you could make the  
3 decision. You might also decide, for whatever the reason  
4 is, that it still warrants a civil penalty and that  
5 discretion is there and can be applied.

6           One other change for which there is an item of  
7 disagreement, and that is a change as to whether or not we  
8 ought to issue a press announcement for a severity level  
9 three violation where we've just proposed it, we have not  
10 imposed it, and should we go forward and issue a press  
11 announcement and make a big case out of it.

12           My view is that as a matter of policy we ought to  
13 provide the opportunity before we make a public  
14 pronouncement, even though we are very careful in trying to  
15 use the words while the action is proposed and to reserve on  
16 the public announcement press release of that action until  
17 such time as we have made up our mind and have given the  
18 licensee a chance to respond, as a general principle, as a  
19 matter of policy.

20           CHAIRMAN PALLADINO: Joe Fouchard, I believe, or  
21 the public affairs people believe that the press release  
22 would be issued when the penalty was imposed. And I was  
23 wondering what their thinking was.

24           MR. STELLO: Mr. Fouchard disagrees --

25           COMMISSIONER AHEARNE: But you do seem to believe

1 that you ought to issue a press release for one and two?

2 MR. STELLO: Yes, at that point --

3 COMMISSIONER AHEARNE: Could you draw the  
4 distinction why?

5 MR. STELLO: In levels one or two, you are out  
6 into the realm where something serious in fact has  
7 happened.

8 COMMISSIONER AHEARNE: Are you saying that on one  
9 and two we know something has happened, on three we suspect  
10 something might have happened?

11 MR. STELLO: Generally that's true, too. On one  
12 and two you know, and with respect to three it includes  
13 suspicion, but can include knowledge. But I take into  
14 account also the importance. By definition, one and two are  
15 far more important.

16 COMMISSIONER AHEARNE: I thought that was more the  
17 distinction, that we knew versus we suspected. I thought  
18 one and two were primarily the importance of the items.

19 MR. STELLO: Both. The importance, if I were to  
20 weigh the primary factor, that would be my primary factor.

21 COMMISSIONER AHEARNE: You wouldn't say you would  
22 put it in three because it was very important, but you're  
23 not positive, would you?

24 MR. STELLO: There's a measure of uncertainty  
25 about everything. I don't think that that would in any way

1 be the overriding factor. Severity levels one and two are  
2 fairly important subjects and there would be a considerable  
3 concern, and I think that the public ought to be informed  
4 immediately.

5           COMMISSIONER AHEARNE: It sounded somewhat that  
6 along with when you reach one and two in your list of  
7 enforcement actions, in addition to the money and so forth,  
8 we also put out a public notice.

9           MR. STELLO: That becomes part of enforcement,  
10 that's correct, it does indeed. And it does have an effect,  
11 a very significant effect. And I think that with respect to  
12 matters of lesser importance we can wait, because they are  
13 damaging, a press release about a level 3 or a level 1 in  
14 terms of the damage that might have to a utility's  
15 reputation I think is probably not much different.

16           COMMISSIONER AHEARNE: But the proposed action  
17 still goes in the public document room?

18           MR. STELLO: Absolutely.

19           COMMISSIONER AHEARNE: So it's not a question of  
20 it being available to the public; it's a question of it not  
21 being a press release.

22           MR. STELLO: I think that's what Joe's point is.

23           CHAIRMAN PALLADINO: Joe, would you comment?

24           MR. FOUCHARD: Yes, sir. My view is that we  
25 should be uniform across the board, that a civil penalty is

1 a serious action. It is viewed I think by the Commission as  
2 a serious action. It is viewed by people who view the  
3 licensee in the local area as a serious action.

4 A proposed action is something that they are  
5 interested in. I think the only disagreement we have is  
6 over severity level three. I would point out that unless I  
7 have been misinformed, the cap on severity level three is  
8 \$100,000. I cannot envision this Commission proposing to  
9 fine the utility \$100,000 and not volunteering that  
10 information.

11 Similarly, I think we have had discussions over  
12 the last day or so about a severity level three case which  
13 is soon to be announced. I cannot envision us not  
14 volunteering a press release in that particular matter  
15 either.

16 I rest my case.

17 COMMISSIONER AHEARNE: Joe, but yet you don't seem  
18 to feel that we ought to issue a press release for four and  
19 five, is that correct?

20 MR. FOUCHARD: Four and five are getting down  
21 pretty much into the noise level, yes, sir.

22 COMMISSIONER AHEARNE: But then it seems to me  
23 that neither I&E nor OPA feels that we ought to be  
24 inconsistent across the board. I&E feels that we ought to  
25 issue them on one and two, not three, four and five, but you

1 believe it should be on one, two and three.

2 MR. FOUCHARD: I may be misinformed on how many  
3 cases we've had of civil penalty on four and five. It may  
4 not be very few.

5 CHAIRMAN PALLADINO: No, it's not very few.

6 MR. FOUCHARD: Okay.

7 MR. STELLO: Does someone happen to have the  
8 statistics?

9 MR. FOUCHARD: That was my impression.

10 MR. THOMPSON: There have been a number of cases  
11 in which severity level four and five violations were  
12 involved in a civil penalty package. However, the event  
13 associated with those civil penalties has been at three or  
14 higher.

15 COMMISSIONER GILINSKY: Were there any civil  
16 penalties levied specifically for severity level four and  
17 five violations?

18 MR. THOMPSON: I don't recall any.

19 MR. FOUCHARD: I don't either.

20 COMMISSIONER AHEARNE: This is an enforcement  
21 policy paper, not a civil penalty paper. Have we issued any  
22 four and five level violations?

23 MR. THOMPSON: Oh, yes, a very large number.

24 MR. STELLO: A very large number.

25 MR. FOUCHARD: I think the civil penalty, Mr.

1 Ahearne, is a very visible action.

2 COMMISSIONER AHEARNE: I would hope that any time  
3 we issue a penalty it's a visible action.

4 MR. FOUCHARD: We go all the way from notices of  
5 violation to civil penalties to orders to modify or suspend  
6 licenses.

7 COMMISSIONER AHEARNE: I would hope that on our  
8 side we take these seriously and we approach these, any  
9 penalty, whether it's a notice all the way up to shutdown,  
10 that it's all taken seriously. So I'm not sure I understand  
11 why there should be a gradation, unless part of the -- if  
12 part of the enforcement package is that at some point we put  
13 the public spotlight on them, even before we finish, then I  
14 would understand it. Otherwise, I don't understand why we  
15 slice it someplace.

16 MR. FOUCHARD: Again, on four and five I don't  
17 believe there have been any civil penalties in that area,  
18 and the only disagreement we have is in that area.

19 MR. STELLO: I should note one thing for the  
20 Commission, that the new definition of severity level three  
21 is a combined three and four level category, and the scale  
22 of severity level three is broader, which will include many  
23 of the items of lesser importance as well.

24 I do view, and I think I want to emphasize, that  
25 issuing a press announcement by itself has a significant

1 effect on licensees.

2           CHAIRMAN PALLADINO: What would be your opinion  
3 about using press releases on proposed penalties or only  
4 civil penalties? Is that what you're proposing?

5           MR. STELLO: For levels one and two press releases  
6 would automatically go. For three as a general matter, it  
7 would not.

8           CHAIRMAN PALLADINO: If there's a civil penalty,  
9 if there's a dollar penalty?

10          MR. STELLO: I would not with three.

11          CHAIRMAN PALLADINO: I'm saying what would be  
12 wrong with saying that any time you impose a civil penalty  
13 that you make a press release even when you propose it,  
14 because if it's severe enough to warrant a civil penalty it  
15 sounds to me it's severe enough to accomplish whatever  
16 purpose you want to accomplish with a press release on the  
17 proposed penalty.

18          MR. STELLO: Because in that case it is of lesser  
19 importance from the safety point of view. The opportunity  
20 to have the licensee present, which is what happens in a  
21 proposed action, his side of the story, and to the extent  
22 that we might modify our action, that the final action,  
23 which is the imposition of the civil penalty itself, is what  
24 is announced, and it allows an opportunity to take into  
25 account what the licensee has said related to the issue. It



1 could include, at least conceivably, full mitigation.

2           CHAIRMAN PALLADINO: I have a feeling that if  
3 you're proposing that if you're proposing a dollar penalty  
4 that you already have concluded there's some real sound  
5 basis for that penalty.

6           MR. STELLO: That's true.

7           MR. KEPPLER: I have a point. In the current  
8 policy there are six severity levels, and where we have had  
9 our biggest difficulties is in those events or problems that  
10 fit in severity level three and severity level four. And  
11 there's been a lot of debate about some proposed findings  
12 that have been issued, and we have mitigated some of them.

13           Once you go out with a press announcement that  
14 licensee is guilty by the fact that the proposed fine has  
15 been levied, whether or not you mitigate the thing in total  
16 -- and what we have done with the new policy is to combine  
17 basically severity level three and four into one severity  
18 and say, instead of it being an automatic civil penalty  
19 action, we're going to put it in the mode of that's an area  
20 we're going to consider very heavily.

21           So it's conceivable to me you may go out with a  
22 proposed civil penalty for that problem in this area, get  
23 the licensee's response back and decide maybe you won't  
24 issue a civil penalty.

25           COMMISSIONER GILINSKY: You're making it sound

1 frivolous, like we go out and say, we'll toss out a penalty.  
2 and if he comes back with a good reason for what he did  
3 we'll cancel the penalty. I assume when you're talking  
4 about these kinds of numbers you're pretty serious about  
5 it. There is at least to your satisfaction a violation that  
6 has taken place and you're levying a penalty.

7 And obviously our system allows the licensee the  
8 opportunity to challenge that. That's his right under our  
9 rules and the law and so on. And if we're proved wrong,  
10 good, we'll change it.

11 CHAIRMAN PALLADINO: What concerns me is we might  
12 not make a deep enough investigation, for a category three  
13 at least or maybe any of the others, if we allow  
14 negotiation, so to speak. I think when we get to the point  
15 of proposing the civil penalty that we should have made a  
16 deep enough investigation, an effective enough investigation  
17 to be rather sure that, by golly, we're on solid ground in  
18 proposing this civil penalty.

19 And once you've proposed it, if you're going to  
20 follow for one or two I think it ought to follow for  
21 wherever you're proposing a civil penalty.

22 MR. KEPPLER: I think that's exactly the reason  
23 that bothers me about this. What this may lead to if we go  
24 the route of issuing a press release, it may lead to a  
25 negotiation get-together beforehand, and I don't think

1 enforcement ought to be conducted that way.

2           CHAIRMAN PALLADINO: I wasn't suggesting that. I  
3 was suggesting that the investigation was such that you  
4 ought to be on pretty solid ground.

5           MR. STELLO: I think that's a fair assumption.

6           CHAIRMAN PALLADINO: I think we have spent more  
7 time on this than we need to.

8           MR. STELLO: When you issue a press announcement  
9 and the press announcement identifies the proposed action --  
10 and this agency is a very visible agency; it does get  
11 considerable media interest. If you issued an announcement  
12 later after the imposition which changed in any way, shape  
13 or form, it's not likely that that will have any media  
14 interest at all.

15           Let me finish. The reason for suggesting this was  
16 that on the lesser important safety issues the agency could  
17 wait to state its final view because it was lesser, and it  
18 was only on that basis of saying, okay, there's at least a  
19 basis to wait in this instance.

20           I know somehow I got pushed into a corner where  
21 I'm against motherhood, which is informing the public, and  
22 I'm certainly not.

23           COMMISSIONER GILINSKY: You used a little  
24 overkill, I think, in defending your view here. Let me ask  
25 you, when we issue a proposed civil penalty doesn't that

1 become a matter of public knowledge whether or not we issue  
2 a press release?

3 MR. STELLO: Yes.

4 COMMISSIONER GILINSKY: So what are we talking  
5 about?

6 MR. STELLO: Whether we formally issue the press  
7 release or not, and there's a big difference.

8 COMMISSIONER GILINSKY: Well, somebody is going to  
9 call you up and interview you anyway, or at least your  
10 successor. And I just don't understand what we're thinking  
11 about.

12 CHAIRMAN PALLADINO: I think we've got as much  
13 input as we're going to get on this question. There are  
14 hopefully some other questions.

15 MR. STELLO: Let me move to slide 4.

16 (Slide.)

17 There's one other change I think I would like to  
18 highlight, and I think the previous two slides identify the  
19 changes. One that I think it's important for the Commission  
20 to focus on, there is a category called miscellaneous  
21 activities now included, which identifies and collects some  
22 of these issues that we've been struggling with in terms of  
23 material false statements, Part 21 violations and what have  
24 you. And there's now a complete brand-new section that  
25 tries to articulate what the policy ought to be for these

1 various kinds of issues.

2           Yesterday I think I did note that there are issues  
3 that can arise where there is an intentional and willful  
4 violation of a regulation or intentional false statement  
5 made of one type or another, for which it can become an  
6 issue of either license revocation -- and this builds on the  
7 concept that there is in fact that kind of severity that can  
8 be behind the issue of having false information --

9           COMMISSIONER AHEARNE: Can we discuss that  
10 subject?

11          CHAIRMAN PALLADINO: Yes, go ahead. I had a  
12 question on that.

13          COMMISSIONER AHEARNE: This is section 7. The  
14 impression I get in reading it, it says, "severity one are  
15 very significant violations involving material false  
16 statements" -- I'll skip some of the others -- "which, had  
17 they been available to the NRC and accurate, would clearly  
18 have resulted in regulatory action."

19               And then severity two is the same type of  
20 violation in the absence of management awareness; level  
21 three, et cetera.

22               The impression I have is that lying to us about  
23 something is not in itself a violation unless the object,  
24 the information about which the guy or woman lied to us, had  
25 it been truthful would have led to some regulatory action,

1 but lying per se is not a violation.

2 COMMISSIONER GILINSKY: Well, a material false  
3 statement doesn't seem in itself to be a violation.

4 COMMISSIONER AHEARNE: That's what I'm trying to  
5 get at.

6 COMMISSIONER GILINSKY: The material false  
7 statement has the added aspect of materiality. In other  
8 words, it's talking about something which is material,  
9 material being something which we would take into account.

10 MR. STELLO: Well, material false statement can be  
11 lying or not, and it can be an omission or commission,  
12 either.

13 COMMISSIONER AHEARNE: But this said it would  
14 clearly have had to have resulted in regulatory action.

15 COMMISSIONER GILINSKY: Let's go back to the VEPCO  
16 case of some years ago, where a company failed to supply us  
17 with a report which in retrospect turned out to be one that  
18 would not have affected our actions, but would have been one  
19 that we would have taken into account. On that basis, we  
20 fined the company pretty severely for those days.

21 MR. STELLO: The fact you would have taken it into  
22 account is a regulatory action.

23 COMMISSIONER AHEARNE: This says would clearly  
24 have resulted in regulatory action.

25 MR. STELLO: But that severity level one is trying

1 to respond to the VEPCO case where it doesn't have to have  
2 -- it would have probably been something more appropriate on  
3 the severity level three or four, which indicated that it  
4 was a material false statement, period. So that's  
5 included.

6 COMMISSIONER GILINSKY: So you're putting that at  
7 severity level three?

8 MR. STELLO: It would be included in severity  
9 level three. At least my recollection of the VEPCO case is  
10 that's what it is.

11 Now, I was trying to deal with the question  
12 Commissioner Ahearne asked me, which is is a lie that has no  
13 materiality at all -- I think that would be a violation of  
14 our regulation if it were a lie in response to questions  
15 that were being asked of an inspector or an investigator,  
16 and a violation of a regulation is a violation.

17 Now, if it had no materiality at all, I guess I  
18 need --

19 COMMISSIONER GILINSKY: Then it's not in our  
20 system; if he gives you the wrong time of day --

21 MR. STELLO: If he asks you the time and he lied  
22 to you, is that a violation?

23 COMMISSIONER AHEARNE: But your sense here is that  
24 you believe that you have covered any case that would be  
25 significant with respect to a lie told to an inspector?

1 MR. STELLO: I think so.

2 COMMISSIONER GILINSKY: It may be a severity level  
3 four. I don't remember the case we were talking about in  
4 detail, whether management awareness was involved or not.  
5 And I'm not sure I know what your definition of that is in  
6 any case.

7 But it might actually have tumbled down to  
8 severity level four.

9 MR. STELLO: Frustration of a regulation process  
10 is a specific regulation in itself. I don't think it falls  
11 in --

12 COMMISSIONER GILINSKY: I'll tell you, what  
13 concerns me is whether or not management is aware of any  
14 specific false statement to the NRC, it seems to me  
15 management does have to take responsibility for a climate in  
16 which such statements are made, or take credit for one in  
17 which they are not made.

18 MR. STELLO: Agreed.

19 COMMISSIONER GILINSKY: And I think that I guess I  
20 would raise these from I guess the basement here to a higher  
21 level.

22 MR. STELLO: Well, the highest level, do you  
23 agree, ought to be when that happens with management  
24 awareness? That is, severity level one.

25 COMMISSIONER GILINSKY: How do you define



1 management awareness?

2 MR. STELLO: We go through an investigation, prove  
3 that management --

4 COMMISSIONER GILINSKY: Suppose you take a plant.  
5 Where would you --

6 MR. STELLO: A plant superintendent.

7 COMMISSIONER GILINSKY: A plant superintendent?

8 MR. STELLO: Yes. I could visualize that there  
9 could be other elements of management which might allow me  
10 to come to this conclusion.

11 COMMISSIONER GILINSKY: The shift supervisor you  
12 would not put in that category?

13 MR. STELLO: I said I would need more information  
14 before I would answer. That's why I was struggling.

15 CHAIRMAN PALLADINO: It's pretty hard to answer  
16 that on a very broad basis because it depends on the  
17 responsibility of the individual.

18 COMMISSIONER GILINSKY: I agree. But I certainly  
19 think that management awareness makes it worse, and it works  
20 the other way, too. But since you specifically put them in  
21 bins here and said when management is aware it's at this  
22 level and when management is not aware it's at this level,  
23 rather than being a flexible factor that you apply to  
24 individual cases, then it is important to know what level of  
25 management we're talking about.

1 MR. STELLO: But I would need to know a lot more  
2 about this particular event before I can answer.

3 MR. DIRCKS: It's so varied. Then you would have  
4 to have a --

5 COMMISSIONER AHEARNE: In B-3 in that same item  
6 and C-3, you didn't seem to have any difficulty.

7 MR. DIRCKS: I guess the way we can leave this is,  
8 if we could get some suggestions we'd be -- I don't think --  
9 if there is any innovative language we could pick up, we  
10 would stick it in here. Why don't we leave it that way?

11 MR. STELLO: I think, having worked at various  
12 levels of management, I think the key point is is that  
13 individual in a position to make a decision about this  
14 matter or must he refer it on up. If he or she is the  
15 individual responsible to make a decision on that matter, I  
16 would say that's the -- that's why I struggled so hard to  
17 answer your question without knowing more of the facts, and  
18 I don't know how to get more guidance in here without trying  
19 to write something that's approaching a very large  
20 document.

21 COMMISSIONER GILINSKY: The other side of it is  
22 very hard to judge, whether this is something one agrees  
23 with or not, unless there are some examples, either real or  
24 imaginary, that you could suggest that would give me a  
25 feeling for just what you have in mind.

1           MR. STELLO: I said if there were actions under  
2 the cognizance of the plant superintendent that he was aware  
3 of that were improper, that's severity level one. If there  
4 were actions taken by the shift supervisor which didn't go  
5 above him and went only below him and no other element of  
6 management was involved, it would depend on what that action  
7 might be. If he were licensed it might be an action against  
8 him.

9           MR. DIRCKS: But now you're talking only about  
10 reactors. It has to apply to fuel cycle plants, to chemical  
11 plants, to reprocessing plants, to anything that goes on.

12           MR. STELLO: The shift supervisor is licensed. To  
13 use that example, then the action would more properly be  
14 directed at him, at he or she and he or she's license. And  
15 the departure then from where we are at this point goes  
16 directly to that individual being a licensee at that level.

17           So you have to get up to some level where you are  
18 above licensed people, which puts us into another element of  
19 management. And I don't really know how to deal with it  
20 without the specific set of circumstances.

21           MR. DIRCKS: I think the point is you have tried  
22 as hard as you could to get it in here. If there is a  
23 suggestion to make it better, we can sit down and work with  
24 it.

25           CHAIRMAN PALLADINO: One thought might be decision

1 level as opposed to recommending level. For example, if I  
2 have to go to my boss to get his approval to do something,  
3 then I am not really the management level that you're  
4 talking about. But if I am free to make the decision to do  
5 something, then --

6 MR. DIRCKS: We can put a footnote under where  
7 we're saying "management awareness" and --

8 CHAIRMAN PALLADINO: You might try it and see if a  
9 word such as that might help.

10 COMMISSIONER AHEARNE: In the footnote that you do  
11 have, when you have a material false statement that is false  
12 by omission or commission, does willfulness enter into that  
13 definition?

14 MR. MURRAY: Not at all.

15 COMMISSIONER AHEARNE: So that in the severity  
16 list willfulness is another factor that gets put on?

17 COMMISSIONER GILINSKY: Where does that come up at  
18 all?

19 MR. STELLO: Willfulness? If there is a  
20 management awareness of the activity that connotes  
21 agreement to go forward with something that was improper,  
22 then it's at that level that it is a severity level one.

23 COMMISSIONER AHEARNE: Jim has just said the  
24 material false statement does not -- the question of  
25 willfulness doesn't enter.

1           MR. STELLO: Absolutely not. But where does it  
2 belong in severity level if I have the management  
3 awareness?

4           COMMISSIONER GILINSKY: So is that your way of  
5 adding willfulness?

6           MR. STELLO: Yes.

7           COMMISSIONER AHEARNE: Wait. This says a material  
8 false statement with management awareness. But if the  
9 material false statement doesn't have willfulness embedded  
10 in it, then it's management awareness of the material false  
11 statement. I don't see that brings in willfulness.

12          MR. MURRAY: Not embedded in it in the sense to be  
13 a material false statement it has to be willful. I didn't  
14 mean that it couldn't --

15          COMMISSIONER AHEARNE: Oh, it does have to be  
16 willful. I see.

17          MR. MURRAY: No, I say it does not have to be  
18 willful. It does not have to be willful to meet the  
19 Commission's definition of a material false statement.

20                 But if it is willful and material and false, it  
21 can also be a material false statement.

22          COMMISSIONER AHEARNE: Certainly. But it does not  
23 have to be. So I'm still trying to figure out where would  
24 willfulness come in as a factor.

25          MR. STELLO: As I understand material false

1 statement in the previous statements made by the Commission,  
2 I could have an act or a fact or information, that  
3 information is such that the whole issue of whether that  
4 wasn't provided to us or wasn't given to us was an act  
5 omitted or committed. When you add that all of that was in  
6 fact known, it was, if you will, not provided to us, that  
7 information, by management awareness, that's the  
8 willfulness.

9           The material false statement could or could not  
10 have it in. But if management was aware that there was  
11 material, that he had information, data which suggested that  
12 something was wrong, improper, false, his application was  
13 false or actions in the plant or whatever and he was aware  
14 of that, then that clearly adds willfulness to it.

15           COMMISSIONER AHEARNE: So in your view the  
16 statement management awareness indicates more than just  
17 aware of a statement that was made or a statement that was  
18 not made, but in addition knows that it should have been  
19 made?

20           MR. STELLO: Yes, and knows the subject with which  
21 the material false statement deals.

22           COMMISSIONER AHEARNE: So management awareness in  
23 your view is willful not reporting of information?

24           MR. STELLO: Yes.

25           COMMISSIONER GILINSKY: Let me ask you this. Why

1 is not every single case of that severity level one?

2 MR. STELLO: It is.

3 COMMISSIONER GILINSKY: No, it's got to be, would  
4 clearly result in regulatory action. And if you've got a  
5 management that is lying to us --

6 MR. STELLO: I guess there is more being read into  
7 "regulatory action" than I thought I had read into it.  
8 Regulatory action to me is, having produced a review process  
9 or an evaluation of the decision, it was okay or it wasn't  
10 okay. It was information the agency needed to have.

11 COMMISSIONER GILINSKY: But we're really talking  
12 about material statements, and "material" means something we  
13 would take into account. And by adding those extra remarks,  
14 you know, qualifications, accurate at the time and so on,  
15 would clearly result in regulatory action, you are  
16 suggesting that materiality is not enough. At least that's  
17 what it suggested to me.

18 Now, what you're saying is that a deliberate  
19 falsification of documents or lying to us on matters which  
20 are material does not in itself go to the top of the heap.  
21 And boy, I think it should.

22 CHAIRMAN PALLADINO: I don't think willfulness is  
23 precluded here. What I can't understand is whether you want  
24 the willfulness in there.

25 COMMISSIONER AHEARNE: My impression is that B

1 didn't see it necessarily in there, but I&E thought it was.

2 MR. DIRCKS: I think it's implied, if you take a  
3 false statement and discuss it with management, that there's  
4 some element of willfulness.

5 COMMISSIONER GILINSKY: Why don't we deal with it  
6 straightforward? Why don't we say there have been mistakes  
7 made and material false statements which have been made  
8 deliberately? We just cannot tolerate the latter category,  
9 and we have talked about this before. The whole system  
10 collapses if we tolerate that.

11 MR. DIRCKS: Why don't you take a look and see  
12 whether you can build in people deliberately telling lies  
13 will be held in greater jeopardy?

14 COMMISSIONER GILINSKY: Well, companies, if you're  
15 talking about management.

16 MR. STELLO: I will look at taking that phrase  
17 "would clearly have resulted in regulatory action" out. I'm  
18 not sure it changes much.

19 COMMISSIONER GILINSKY: I'm not sure what you  
20 meant by it, but it suggested a fairly sharp qualification.

21 MR. DIRCKS: This is a newly developed section. I  
22 think we developed it in response to much of the concerns  
23 the Commission has expressed. It can be improved and we'll  
24 go back and take a look at it.

25 CHAIRMAN PALLADINO: Do you have any more, Vic?



1 MR. STELLO: No, I was going to quit at that  
2 point. I think I hit what were the major issues that the  
3 Commission would be interested in and the more significant  
4 changes, and at that point go to answer any questions the  
5 Commission wants.

6 CHAIRMAN PALLADINO: I wonder if I could begin  
7 with a couple of factual questions. It's not clear from  
8 reading this document at two different parts what the  
9 maximum penalty is. For example, on page 7 it's the second  
10 paragraph that talks about up to the statutory limit of  
11 \$100,000 per violation per day. Then on the next page,  
12 almost in the middle of the page it says: "However, in no  
13 instance will the civil penalty for any one violation exceed  
14 \$100,000."

15 MR. STELLO: Per day.

16 CHAIRMAN PALLADINO: Well, you want to add it.

17 Another question has to do with Table 1, which is  
18 on page 10. You have severity levels and then you have  
19 categories, and I didn't know what a category was. It says  
20 "non-category one" -- I'm sorry, I'm looking at the headings  
21 and I'm looking at -- proceeding from the heading  
22 "safeguards" it says "non-category one" and "category one."  
23 And I don't know what that means and I couldn't find it in  
24 the document.

25 And somehow category one seemed like --

1 MR. DIRCKS: We can define what category one is.

2 CHAIRMAN PALLADINO: It's from the regulations.

3 It was important to me because, not knowing and just  
4 following your general approach that if something was  
5 category one it seemed like it ought to have a higher fine  
6 than if it was non-category one. And I'm not sure whether  
7 -- there's a lot to understand there.

8 COMMISSIONER BRADFORD: It seems like a good  
9 question. Why isn't that the case?

10 CHAIRMAN PALLADINO: I didn't know what "category"  
11 meant.

12 COMMISSIONER BRADFORD: Category one is a  
13 strategic quantity.

14 MR. STELLO: He's going to get the regulations.  
15 The "non" belongs over there.

16 MR. DIRCKS: It's a mirror image.

17 (Laughter.)

18 COMMISSIONER AHEARNE: That's all right.  
19 Everybody would have known what they were.

20 CHAIRMAN PALLADINO: There was another question.  
21 Suppose you have multiple violations over an extended period  
22 of time. Does this give you any guidance as to what is the  
23 maximum that you would go to? I appreciate that part of the  
24 situation may be complicated. As a matter of fact, it may  
25 be we didn't catch it soon enough.

1 But if there are a number of things that you  
2 eventually find and you find out they have been in existence  
3 for 100 days, is there any guidance here that tells you what  
4 --

5 MR. STELLO: It tells you how to do the per day.  
6 But I don't think, to answer the question of, does this  
7 policy in some way say that you are prohibited from issuing  
8 a civil penalty in excess of X dollars, I think the answer  
9 is no in that context. There is no upper limit.

10 CHAIRMAN PALLADINO: Well, I don't feel  
11 comfortable in not knowing what we would do in a  
12 circumstance if you find five violations and four of them  
13 were for 100 days and one was for 50 days. Would you apply  
14 the \$100,000 limit if that were the limit?

15 MR. STELLO: No, for 100 days, no, not likely.  
16 The policy we have been working under is --

17 CHAIRMAN PALLADINO: Well, why not? Why wouldn't  
18 you do that? Let's assume no mitigating circumstances  
19 except our own inability to find it.

20 MR. STELLO: First, with respect to previous  
21 guidance and the way we have been operating, if we were to  
22 propose a civil penalty in excess of \$300,000 we would come  
23 back to the Commission and explain on what basis we felt  
24 there was a justification to go beyond that limit in a  
25 particular instance. I would feel that that policy would

1 still prevail.

2 CHAIRMAN PALLADINO: Is that in here, the \$300,000  
3 limit you would come to the Commission?

4 MR. STELLO: Yes.

5 CHAIRMAN PALLADINO: I missed that.

6 MR. STELLO: That is the policy we've been  
7 operating under.

8 CHAIRMAN PALLADINO: Is that in here?

9 MR. BICKWIT: Yes, it is.

10 MR. STELLO: With respect to any prohibition on  
11 any upper limit beyond that, we have not dealt with that  
12 subject except a hypothetical example you presented to me  
13 results in a civil penalty of \$10 million. Although there  
14 may be circumstances for which that clearly is a  
15 consideration, it seems very, very unlikely to me that that  
16 would arise, that we would ever feel the need to impose a  
17 civil penalty of \$100,000 a day for 100 consecutive days.

18 But you know, I guess all generalizations are  
19 false, including that one. It's just I can't think of an  
20 example.

21

22

23

24

25

1           COMMISSIONER BRADFORD: Vic, while we're still  
2 somewhere near Table 1-A, if I'm reading it correctly, would  
3 you tell me what the penalty would be for materials licensee  
4 that gave you a false statement in the course of an  
5 investigation, about how many sites containing waste he  
6 happens to have on his property?

7           MR. STELLO: A materials licensee?

8           COMMISSIONER BRADFORD: Yes.

9           MR. STELLO: By definition, the theoretical is  
10 \$100,000. The discretion is there to go that high.  
11 Depending on the circumstances, the number would be for  
12 severity level 1 it would be \$1000.

13          COMMISSIONER AHEARNE: Well, it depends on -- you  
14 said materials licensee.

15          COMMISSIONER BRADFORD: I'm saying the materials  
16 licensee.

17          MR. STELLO: I assume you meant the last one.

18          COMMISSIONER BRADFORD: Somehow we seem to be  
19 coming out at variance using this table with the experience  
20 we've heard about just in the last 24 hours.

21          MR. STELLO: I suggest that there is discretion to  
22 allow that to go up to \$100,000.

23          CHAIRMAN PALLADINO: I don't understand that  
24 \$100,000 limit, because then you say you can go to 100%  
25 above that. So which is it? Is it \$100,000 per day?

1 COMMISSIONER AHEARNE: \$100,000 per day is limited  
2 by law.

3 CHAIRMAN PALLADINO: So when you have something  
4 like \$100,000, I presume that's per day. Then here it says  
5 you can go up 100%. You can't go up 100%?

6 COMMISSIONER AHEARNE: No, no, this table down  
7 here is really to tell you what is the basis for the  
8 Category 2, 3 --

9 CHAIRMAN PALLADINO: I know, but it's always  
10 limited by the \$100,000, that's an absolute limit.

11 MR. STELLO: That's correct.

12 CHAIRMAN PALLADINO: So you can't vary it 100%  
13 except within those limits.

14 MR. STELLO: Except within those limits, that's  
15 right.

16 COMMISSIONER GILINSKY: What's the significance of  
17 the table, then?

18 COMMISSIONER AHEARNE: The upper table talks about  
19 the base for severity 1, and the bottom table is now to tell  
20 you what are the appropriate bases for Categories 2, 3, 4  
21 and 5.

22 CHAIRMAN PALLADINO: That's the other thing that  
23 you go 100%?

24 MR. THOMPSON: If Mr. Ahearne's interpretation is  
25 correct in the way we wrote it, that bottom portion is to

1 not apply to the severity levels. There is the narrative  
2 that does state plus or minus 100% on the severity level 1  
3 for the large licensees. That carries you over \$100,000  
4 which is the statutory limit.

5 COMMISSIONER GILINSKY: How does it apply to the  
6 bottom of that table where it's \$1000 or \$6000?

7 MR. STELLO: Normally it's plus or minus 100%,  
8 which could take you to a factor of 2 higher. But  
9 there's a blanket statement of discretion if something was  
10 particularly egregious or if there was a need, you could go  
11 up to \$100,000. There's no prohibition in law that prevents  
12 you from doing that.

13 This policy is trying to, you know, tell you what  
14 to do; hopefully, most of the time to guide you.

15 COMMISSIONER GILINSKY: But I thought that most of  
16 the -- you don't feel that's a commitment to state whether  
17 or not --

18 MR. STELLO: The law allows you to go to  
19 \$100,000. There's nothing in this policy -- if you have  
20 something particularly egregious, to use the full force of  
21 the law.

22 COMMISSIONER BRADFORD: But it is true that on the  
23 face of the policy, using this table for the case we were  
24 talking about, you would come out at 500?

25 MR. MURRAY: You'd come out at 4000, I believe.

1 You've got the 8000 and you've got the severity level 3.

2 COMMISSIONER BRADFORD: You would consider them an  
3 industrial user rather than under the category of other  
4 materials licensees?

5 MR. STELLO: There are other factors you apply if  
6 it's particularly egregious, which is above these.

7 COMMISSIONER BRADFORD: Which is what would get  
8 you from 400 or 500 up to --

9 MR. STELLO: Right.

10 CHAIRMAN PALLADINO: Can I still come back to my  
11 question on the limit of \$300,000? It says under --  
12 incidentally, this is comments which I didn't think were  
13 part of the policy. It says, "Currently, the policy calls  
14 for Commission review when..." Then it says, "...the civil  
15 penalty for a single violation exceeds \$300,000."

16 What I'm saying is why shouldn't that be in the  
17 policy?

18 VOICE: It is.

19 CHAIRMAN PALLADINO: Where? Just only by the  
20 question and answer?

21 MR. THOMPSON: On page 15 of the policy itself you  
22 will find a discussion of the conditions under which we  
23 notify or consult with the Commission on actions. Item 2  
24 towards the top of the page.

25 MR. STELLO: It's three times severity level 1



1 values. Page 15.

2 MR. THOMPSON: Of the policy itself.

3 MR. STELLO: In the policy.

4 MR. THOMPSON: There are four cases where we will  
5 always come to the Commission.

6 CHAIRMAN PALLADINO: Okay, thank you.

7 COMMISSIONER GILINSKY: Let me get back to that  
8 Table 1-A. Let's take a case that we haven't dealt with,  
9 let's take a test reactor or whatever. And suppose that you  
10 decide that the violation was so severe that it ought to  
11 exceed 100% above \$10,000; it ought to be, I don't know,  
12 \$25,000 or \$40,000. How much of a case does someone have in  
13 coming back to us and saying wait a minute, you agreed on  
14 certain guidelines and you're going way beyond these  
15 guidelines. And, you know, sure, you have the discretion  
16 under the law, but you agreed to put certain limits on what  
17 you are going to do.

18 MR. MURRAY: I think there's no question but that  
19 there is some inhibiting effect in establishing the policy.  
20 It's not a legal effect but it could be viewed -- I'll turn  
21 it over to Leonard -- by a reviewing court as reflecting  
22 some abuse of discretion if it weren't independently  
23 justifiable.

24 MR. BICKWIT: Agreed.

25 MR. STELLO: Independently justifiable means it was

1 very serious.

2 MR. MURRAY: Yes. If you had a particularly  
3 egregious example that the policy itself specifically  
4 reflects that in those cases we can go above. I don't think  
5 you can predict in advance, or it's very difficult and we  
6 haven't been able to, exactly what every individual case is  
7 going to look like to set the rules for.

8 COMMISSIONER GILINSKY: Okay, so we have a certain  
9 base penalty. But in attaching the plus 100% to it, I would  
10 assume -- and I would think most people would assume -- that  
11 that covers the range of cases up to pretty bad cases.

12 MR. BICKWIT: There's a reference in the policy  
13 itself to special circumstances allowing you to depart from  
14 these principles, and that would certainly be relied on in  
15 any suit of the nature you are posing.

16 MR. MURRAY: That would be an exercise of  
17 discretion when you departed from it, and any exercise of  
18 discretion will be judged whether it's been abused or not,  
19 and that's going to depend on the particular circumstances  
20 of the exercise of the discretion.

21 MR. BICKWIT: On page 1 it says, "Each enforcement  
22 action is dependent on the circumstances of the case, and as  
23 far as emphasizing discretion, after consideration of these  
24 policies and procedures."

25 CHAIRMAN PALLADINO: Can I ask a couple more

1 questions? At some places -- and I'll have to look here --  
2 at some places they are called, I guess, Supplement Number 4  
3 severity categories. It talks about very significant  
4 violations involving whole body exposure of a number of the  
5 public in excess of two and a half rems radiation. And in  
6 some places it talks about half a rem.

7 For example, when we come to transportation it's a  
8 half a rem, and they are both severity 1, and somehow they  
9 don't seem consistent.

10 COMMISSIONER AHEARNE: Well, add to the  
11 inconsistency the half a rem annual whole body radiation  
12 exposure to member of the public in excess of 0.5 rem for  
13 transportation is severity level 1, and for health physics  
14 the exact same statement is severity level 2.

15 CHAIRMAN PALLADINO: Okay, that's another way of  
16 putting it.

17 MR. KEPPLER: When we were here for the first  
18 go-around, --

19 COMMISSIONER AHEARNE: (Inaudible.)

20 (Laughter.)

21 MR. KEPPLER: -- there was a question as to  
22 whether or not there should be an absolute gradation of  
23 severity levels or relative gradation of severity levels.  
24 And because of the emphasis, the experiences and the  
25 emphasis the Commission wanted to give to certain areas such

1 as construction, transportation, we agreed to achieve a  
2 higher level of compliance, that we would make severity  
3 levels 1 and 2 for these areas, recognizing that the actual  
4 safety importance of the violations may not be as great as  
5 perhaps a severity level 1 in reactor operations.

6           So it's my recollection that it was a conscious  
7 decision to go this way, and it's one, by the way, that was  
8 discussed heavily in the comments as to whether or not we  
9 should have an absolute severity level between categories,  
10 or relative severity level.

11           Let me just add if you take, for example, a  
12 severity level 1 for reactor operations where you have an  
13 actual health and safety problem occurrence, it's very hard  
14 to place a severity level 1 for construction in the same  
15 category because you really don't have an imminent health  
16 and safety concern at a construction site. So you may not  
17 -- if you went with an absolute standard, you may really  
18 start out, then, with your highest category in construction  
19 being a severity level 3, for example.

20           CHAIRMAN PALLADINO: That's not necessarily  
21 wrong. What I'm a little worried about is that everything  
22 -- what normally we might consider a relatively minor  
23 incident now gets to be severity level 1, and it masks the  
24 importance of a severity level 1 in a reactor.

25           MR. KEPPLER: Well, I will say this. My reaction

1 to that aspect of the comment was that we really don't have  
2 any severity level 1's in transportation. Over the period  
3 involved, we didn't have any severity level 1's in  
4 construction that I'm aware of.

5           So it's really, I think, shown -- my personal view  
6 is that it does offer the opportunity to show that the  
7 Commission places a high level of importance on these  
8 matters, and I don't think it masks the other aspect of it.

9           CHAIRMAN PALLADINO: Should there be a T-1 for  
10 transportation, so you have some flavor that these are not  
11 of equal importance?

12          MR. KEPPLER: We tried to say that in the body of  
13 the document. Maybe we could --

14          CHAIRMAN PALLADINO: It seems strange there should  
15 be that much variation. I can see the value of relative  
16 priorities, but somehow one that is interested needs to know  
17 that they don't --

18          COMMISSIONER AHEARNE: I'll have to admit that  
19 putting it so clearly you have weeded out the inconsistency.

20          MR. KEPPLER: I don't think it's all bad.

21          CHAIRMAN PALLADINO: No, maybe an easy way out is  
22 to say that's a priority level. I hesitate to make the  
23 suggestion because I haven't thought it through that far,  
24 but maybe you want to consider something like T-1 or  
25 whatever.

1 Now, one of the problems we have had in past  
2 enforcement accidents, or at least one that I think we have  
3 had, is when do you take these enforcement actions. Should  
4 the policy statement set forth a timetable for enforcement  
5 actions? And what sort of timetable might we want to  
6 consider? I'm really throwing this out as questions.

7 MR. STELLO: It's not in there. That ought to be  
8 procedures that are followed by the office. We have tried  
9 very hard to get our enforcement actions down to 30 days.  
10 That's a very, very difficult --

11 COMMISSIONER GILINSKY: Thirty days after the  
12 event?

13 MR. STELLO: Thirty days after the report.  
14 Identification is a better way to say it, and that's very,  
15 very difficult to do. Some of them are fairly complex. You  
16 may have the problem identified months and months before you  
17 have finished.

18 CHAIRMAN PALLADINO: I agree, maybe you don't want  
19 a timetable in the policy statement, but we ought to have  
20 some guidelines somewhere.

21 Let me ask one more and then I will let others go  
22 on. Under Facility Construction it talks about severity 1  
23 applies only when a structure or a system has been  
24 completed. Now, should severity 1 also apply when a  
25 structure or system could be completed in such a manner that

1 it would not have been -- would not have satisfied its  
2 intended safety-related purpose? If you have to wait before  
3 you can give it a severity 1 until everything is complete it  
4 sounds to me that we have waited too long, especially when  
5 there's something along the way. And we should identify it  
6 as a very severe situation that we want to change before it  
7 gets completed.

8 MR. STELLO: Mr. Chairman, I think that's probably  
9 very difficult to do. You could have a designer that makes  
10 a very simple error in a design or calculation, and the  
11 whole procedural process -- that's the QA system itself --  
12 would be operated to find it, but at the time you find that  
13 error, if that had been constructed it would have been a  
14 major problem. You have not allowed the rest of the system  
15 to do its job.

16 I would find it very hard.

17 COMMISSIONER GILINSKY: But suppose somebody lied  
18 to us along the way?

19 MR. STELLO: I don't see the connection.

20 CHAIRMAN PALLADINO: Well suppose there were false  
21 records?

22 MR. STELLO: I thought your question was if they  
23 were constructing something and there was one place in the  
24 process where if it had gone into construction and been  
25 built, it could create that problem. I say if you try to go

1 into the system at any other point, you are, in a sense,  
2 removing a very normal part of the process which would look  
3 at the design review and audit and many things that are done  
4 prior to the construction that should, in fact, design to  
5 catch the problem.

6 Now, I don't see how lying to us --

7 COMMISSIONER GILINSKY: I guess I misunderstood  
8 what you have in mind. Does the restrictions on  
9 construction simply not apply to your supplement 7?

10 MR. MURRAY: That's right. A lie would be judged  
11 under supplement 7, not under supplement 2, even though it  
12 occurred during construction.

13 COMMISSIONER GILINSKY: Good enough.

14 COMMISSIONER AHEARNE: Let me follow this. When  
15 you say completion your footnote has acceptance by the QA  
16 organization, indicating that the structure is ready for  
17 pre-operational testing.

18 MR. STELLO: Yes.

19 COMMISSIONER AHEARNE: Now let's take, for  
20 example, building a containment. When you say accepted and  
21 ready for pre-operational testing are you saying that the  
22 whole structure is now complete, the whole containment has  
23 been built and they are ready for pressurization tests? Is  
24 that the point that you would feel that until that point you  
25 could never get severity 1?



1 MR. STELLO: No, there are acceptances long before  
2 that.

3 COMMISSIONER AHEARNE: There are acceptances long  
4 before that but the first pre-operational testing --

5 CHAIRMAN PALLADINO: Maybe I'm misunderstand you,  
6 Vic, but I could picture situations where they're doing  
7 things wrong and you say, My God, we can't allow that. But  
8 it isn't completed.

9 MR. KEPPLER: But they would be taken care of  
10 under severity level 2 or 3 where there are breakdowns in  
11 the quality assurance program of that activity.

12 CHAIRMAN PALLADINO: It may not be quality  
13 assurance; it may just be that the fellow was doing it wrong.

14 MR. KEPPLER: That should be called as part of the  
15 quality assurance.

16 MR. STELLO: Look at the normal process that's  
17 going on. You have an architect-engineer and a constructor  
18 and many other subcontractors supplying equipment. The  
19 subcontractor is building a subassembly which is improper.  
20 He comes to the site and there are normal QA processes that  
21 might be on as part of the constructor or AE, where even the  
22 Licensee rejects it. So it never went in.

23 The example you give would suggest that you could  
24 say that's severity level 1, let's take it all the way to  
25 the point where it was installed and it's sitting in the

1 plant actually installed in there. But as part of the  
2 licensee's program to go in when that system is being turned  
3 over to him, he has a procedure where he goes through all  
4 the records to be sure that everything is done the way it  
5 is, and he said, you installed that in there the wrong way;  
6 please take it out and put it in right.

7 I think what you want to do is make sure that the  
8 whole system has had a chance to operate before --

9 CHAIRMAN PALLADINO: Let me give you an example.  
10 You have welds to be made, and surreptitiously to save time  
11 the fellows are just laying the weld rods in there, and it  
12 goes on and you finally catch it. But the whole system  
13 isn't complete and you say, by golly, that is a very severe  
14 situation. And you might want to call it severity level 1  
15 but you can't do it yet because the system isn't finished  
16 and you don't want it to come along that way. And this kind  
17 of thing has happened.

18 COMMISSIONER AHEARNE: The mitigating factor there  
19 would probably be that you might make them go back and tear  
20 out a lot of this stuff.

21 CHAIRMAN PALLADINO: True, that's exactly what you  
22 do.

23 MR. STELLO: I think I understand your problem.  
24 Enforcement is not just civil penalties. If we saw  
25 practices such as that, we have a lot of other tools in our

1 box that we can use. One of them that we could pull out is  
2 an order that says "cease and desist."

3 If the kind of problem you described is going on,  
4 then it would seem to me that maybe the enforcement tool is  
5 stop. Not a civil penalty.

6 CHAIRMAN PALLADINO: I agree, but if you follow  
7 that, you would never have any civil penalties. I'm saying  
8 if you find that there ought to be some opportunity or some  
9 caveat or enough flexibility so that you're not excluded  
10 from calling something that's major a severity level 1.

11 MR. STELLO: Okay. But I guess what I'm trying to  
12 suggest is there are a variety of enforcement actions, and  
13 whenever something happens that the totality of the  
14 enforcement process has to be considered. Your example  
15 suggests to me practices going on in the plant that cannot  
16 be tolerated under any circumstances and they have got to be  
17 stopped.

18 CHAIRMAN PALLADINO: But now if you stopped them  
19 and I can't penalize them --

20 MR. STELLO: Oh, you did. The minute you stopped  
21 them you killed them.

22 CHAIRMAN PALLADINO: Yes, I know, but they get  
23 started again and fix it up, and I'm not sure I've gotten  
24 management attention to the severity of this kind of problem.

25 MR. DIRCKS: I think we can take account of that.

1           CHAIRMAN PALLADINO: Okay, why don't I let  
2 somebody else go on?

3           COMMISSIONER AHEARNE: First a question for you,  
4 Joe. Do you intend to reach final approval of this today?

5           CHAIRMAN PALLADINO: No. I thought after we're  
6 through we ought to see what may develop out of this,  
7 because I think because I think we will want to vote.

8           COMMISSIONER AHEARNE: Okay, because I had several  
9 minor questions --

10          CHAIRMAN PALLADINO: -- not today.

11          COMMISSIONER AHEARNE: -- that I might just as  
12 well put into a piece of paper and send to Victor. They are  
13 not anything significant.

14          One, I would like an explanation. In the comments  
15 and response section that you have you have commented on  
16 implementing the policy, NRC should follow requirements of  
17 the Regulatory Flexibility Act; response: the policy is not  
18 subject to the act. And maybe a word or two about why would  
19 help tremendously.

20          MR. KEPLER: There are two reasons, Commissioner  
21 Ahearne. First is this is not a regulation and therefore it  
22 would not be subject to regulatory flexibility. And second,  
23 it wasn't a regulation; it was proposed prior to the  
24 effective date of the Regulatory Flexibility Act.

25          COMMISSIONER AHEARNE: So it's not that if it were

1 being put out now, your second argument for being out now;  
2 it would be subject --

3 MR. KEPLER: If it was being put out now as a  
4 statement of policy it would not be applicable. If it would  
5 be put out now as a binding regulation then it would be.

6 COMMISSIONER AHEARNE: And there the distinction  
7 is policy versus regulation?

8 MR. KEPPLER: Right.

9 COMMISSIONER AHEARNE: You have struck the  
10 references to operator civil penalties, and essentially I  
11 think have left either neutral or the impression that  
12 pending further Commission review and decision you won't  
13 take action against operators. Could you say a few words  
14 why you took the operator section out?

15 MR. STELLO: That was an area that had  
16 considerable comment. I see leaving it neutral, which is  
17 what I think it is, having a significant benefit in easing  
18 the tension that's present in the licensed operators. I see  
19 no need at this point to add to that process.

20 COMMISSIONER AHEARNE: Do you view the taking out  
21 -- is that equivalent to saying that the enforcement policy  
22 is such that we will not take actions against individuals?

23 MR. STELLO: No, it's on a case by case basis.

24 COMMISSIONER AHEARNE: Okay, but you're not  
25 equating it to --

1 COMMISSIONER BRADFORD: Does it say that anywhere?

2 COMMISSIONER GILINSKY: You were asking that and I  
3 mentioned it. Joe, why isn't there a supplement covering  
4 individual licensees?

5 CHAIRMAN PALLADINO: I thought it was in there  
6 because I was interested in that.

7 COMMISSIONER AHEARNE: The statement in response  
8 says enforcement actions for licensed operators will be  
9 determined on a case-by-case basis. Now, there's a  
10 statement somewhere else in the policy itself which I  
11 thought left a slightly different impression.

12 CHAIRMAN PALLADINO: I think it's on page 2 of the  
13 policy statement, if I'm reading right.

14 MR. STELLO: They are covered in that supplement 7  
15 to the extent they are licensed.

16 COMMISSIONER GILINSKY: That's all material false  
17 statements.

18 MR. STELLO: They're covered by those --

19 COMMISSIONER GILINSKY: That just deals with  
20 material false statements. That's something I've been  
21 interested in, but there are all sorts of other possible  
22 violations.

23 MR. STELLO: That's true.

24 MR. KEPPLER: If they are materials licenses it  
25 would be covered under the materials license supplement.

1           COMMISSIONER AHEARNE: Let me go on and ask  
2 another question.

3           MR. STELLO: Let me just say it was a judgment  
4 that we were best off leaving it out for now. If the  
5 Commission wishes, we will add it.

6           COMMISSIONER AHEARNE: The flavor I got in the  
7 policy statement itself was that it would be done on a  
8 case-by-case basis, but pending further Commission action it  
9 will be done.

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 MR. STELLO: If there is such a statement, we'll  
2 take it out.

3 COMMISSIONER AHEARNE: The issue on nonprofit  
4 hospitals and other nonprofit institutions, in going through  
5 the package of comments I was struck by the very large  
6 number of hospitals that responded. I had expected a lot of  
7 utilities to respond.

8 Could you say a few words about why the hospitals  
9 seemed to be so upset and concerned, perhaps either comments  
10 that you have or --

11 MR. STELLO: We have taken some action against  
12 hospitals.

13 COMMISSIONER AHEARNE: I understand that. But the  
14 flavor at least from the comments seemed to go beyond what I  
15 would have expected. It was almost as though the attitude  
16 was they were surprised to find that they were subject.

17 MR. THOMPSON: I can respond to that, Commissioner  
18 Ahearne. In the course of the public meetings -- and if you  
19 look through the enclosure three --

20 COMMISSIONER AHEARNE: I did.

21 MR. THOMPSON: -- you will find that not only are  
22 there a number of hospitals, but a substantially larger  
23 number of hospitals that commented from the Midwest than any  
24 other portion of the country.

25 There's also a particular commenter who made an



1 appearance at the Chicago meeting, who is very active in  
2 consultant work with hospitals. Based on information he  
3 provided at the meeting on the nature and wording associated  
4 with the comments from the hospitals, we are convinced that  
5 there was a concerted effort on the part of this particular  
6 consultant to marshall his clients in a write-in campaign  
7 where they shared his views, and obviously they did share  
8 his views, that we were now establishing something new that  
9 did not exist before for medical licensees.

10           We don't think that squares with the situation  
11 that pre-existed or exists now, but it does help to explain  
12 the large number of commenters that are in parallel.

13           COMMISSIONER AHEARNE: As I said, that was the  
14 flavor I was getting through here, that they were expressing  
15 great concern that we were going into an area that we had  
16 not gone into before. And I would suggest on these comment  
17 responses that we go out with that some of that gets picked  
18 up, because really throughout here when you read the  
19 hospital positions the flavor is, hold off for at least  
20 another six months, you've hit us with something we never  
21 realized we were liable for, this is a whole new area the  
22 NRC is going into, which isn't true.

23           MR. THOMPSON: That's not uniform from all the  
24 hospital responders. Some of them recognized they had been  
25 and continue to be vulnerable to actions. But they didn't

1 like the nature of the actions we were proposing.

2           COMMISSIONER AHEARNE: You mentioned in your  
3 comment response the comment was, any civil penalties  
4 imposed on nonprofit hospitals or nonprofit institutions  
5 would have to be paid by increasing charges to the public.  
6 In response you say Table 1 has been modified to address  
7 this concern.

8           Could you say a few words about how Table 1 was  
9 modified to reflect that concern?

10          MR. THOMPSON: We addressed it in terms of the  
11 reflection of ability to pay in general, which of course  
12 does not apply across the board. There are some very large  
13 nonprofit organizations. But in general, medical  
14 institutions and nonprofit organizations we did put into the  
15 table at a different point to indicate we recognize the  
16 ability to pay.

17          COMMISSIONER AHEARNE: The \$4,000 figure is lower  
18 than what it used to be.

19          MR. THOMPSON: I believe that's correct. I would  
20 have to check my notes. I believe that's correct.

21          COMMISSIONER AHEARNE: Well, let's see now. That  
22 point is because a nonprofit institution has to flow its  
23 charges back to the public. Now, would that also hold true  
24 for TVA? Would you reduce your penalties for them?

25          MR. THOMPSON: It's awaiting his judgment.

1 (Laughter.)

2 COMMISSIONER AHEARNE: I was just wondering, are  
3 there other municipal --

4 MR. STELLO: TVA is not considered as a  
5 nonprofit. It's a power reactor.

6 COMMISSIONER AHEARNE: What about SMUD?

7 MR. STELLO: They are not a nonprofit  
8 organization. They are a power reactor.

9 COMMISSIONER AHEARNE: Okay. But what this says,  
10 the comment is any civil penalties imposed on nonprofit  
11 hospitals or other nonprofit institutions would have to be  
12 paid by increasing charges to the public. Table 1 has been  
13 modified to address this concern. The Commission does not  
14 desire to increase consumer costs.

15 MR. DIRCKS: I think the footnote on that 1-A says  
16 nonprofit institutions includes academic, medical and  
17 nonprofit institutions.

18 COMMISSIONER AHEARNE: Yes, to nonmaterial  
19 licensees. I think you'd better expand --

20 MR. DIRCKS: Fine. We'll just say nonprofit.  
21 I'll make it clear it's material licenses.

22 COMMISSIONER AHEARNE: I guess this probably has  
23 now been explained, but on page 4, the last paragraph, for  
24 enforcement actions you say the severity level of violations  
25 involving the failure to make a required report will be

1 based upon the significance of and the circumstances  
2 surrounding the matter.

3 Are you there specifically speaking to material  
4 false statement issues that we've just discussed?

5 MR. STELLO: I wasn't following that.

6 MR. THOMPSON: The prior policy the staff had used  
7 prior to the interim policy was that failure to report would  
8 be regarded with the same seriousness as the event not  
9 reported. Following Commission guidance given to us on the  
10 interim policy and consistent now, there are reporting  
11 situations which under the revised policy and under the  
12 interim policy can be treated as more serious than the  
13 event.

14 Yes, to answer your question more directly, I  
15 think it is both the material false statement and the  
16 reporting which may not be involving material false  
17 statements.

18 COMMISSIONER AHEARNE: So you would view, then,  
19 that this statement allows you to increase rather than to  
20 decrease the penalty due to the failure to report?

21 MR. THOMPSON: I think it could work both  
22 directions, but it does provide the latitude to regard more  
23 seriously the failure to report than the event not  
24 reported. But it could work downward as well.

25 COMMISSIONER AHEARNE: Okay. On page 5, the

1 paragraph directly above "civil penalty," you say:

2 "Licensees are not ordinarily cited for violations resulting  
3 from matters not within their control."

4 Would you explain that a little bit?

5 MR. THOMPSON: In the interim policy that  
6 statement was included as well, with an expansion clause  
7 that says, "such as a faulty design, installation,  
8 maintenance procedures," a number of those. And a former  
9 colleague of yours commented specifically that that was not  
10 what he envisioned when we provided that out for licensee  
11 control.

12 We have left out the qualifying clause in the  
13 revised policy, in an attempt to respond to that commenter.

14 COMMISSIONER AHEARNE: Well, that now eliminates  
15 the qualifying clause, but what do you mean by "matters not  
16 within their control."

17 MR. THOMPSON: We do believe that acts of God are  
18 included. They are really unquestionably beyond the control  
19 of the licensee.

20 MR. STELLO: The problem was before you had  
21 equipment failures and then you had except for those caused  
22 by everything that can cause equipment failure. And the  
23 intent was that you really can have equipment failures that  
24 the licensee has really done everything reasonable in  
25 maintenance and design and everything else and it breaks, it

1 wears out. It's out of his control if something breaks and  
2 leaves a piece of equipment inoperable.

3 COMMISSIONER BRADFORD: Can I just add, while  
4 we're on this subject of the former colleague -- how did you  
5 happen to decide, not that I mind, to treat Commissioner  
6 memoranda as comments?

7 MR. THOMPSON: When we were establishing the  
8 docket, Commissioner Bradford, we arranged downstairs for  
9 everything that came in on the interim policy to be docketed  
10 and assigned a number. And it so happened that the sequence  
11 in which Commissioner memoranda arrived to be docketed --  
12 they wanted it docketed on this subject and it was assigned  
13 a number, no significance to it at all.

14 COMMISSIONER BRADFORD: It wasn't so much the  
15 assigning of the numbers as just the inclusion of them among  
16 the public comments. I thought that mine, and I don't know  
17 about Joe's, had been circulated before the policy went out  
18 and was commented, and the provisions of it that were adopted  
19 or not adopted by the Commission before we ever put the  
20 thing out.

21 MR. THOMPSON: It was simply the administrative  
22 procedure of putting them all in one document. We attached  
23 no greater significance

24 (Laughter.)

25 COMMISSIONER BRADFORD: That was clear.

1 MR. THOMPSON: We anticipated if you wished to  
2 speak ex cathedra it would be in a session such as this.

3 COMMISSIONER BRADFORD: There is nothing ex  
4 cathedra about this.

5 COMMISSIONER AHEARNE: Page 9. Let me read this  
6 section and then tell you what -- or ask the question. You  
7 say: "However, to emphasize the focus on the fundamental  
8 underlying causes of the problem, the cumulative total for  
9 all violations which contributed to or were consequences of  
10 the problem will generally be based on the amount shown in  
11 the table as adjusted. If an evaluation of such multiple  
12 evaluations shows that more than one fundamental problem is  
13 involved, then separate civil penalties may be assessed."

14 The impression I get from this is that even if  
15 there were many serious violations, that if you can trace  
16 that back to a single cause then you will only give one  
17 penalty. And the reason seems to be to emphasize the focus  
18 on the fundamental cause, which then shifts from the  
19 seriousness of the effects.

20 MR. STELLO: Let me tell you what the intent was.  
21 The intent was that our enforcement actions ought to get and  
22 deal with the fundamental causal problem. If there are  
23 problems, then we try to arrange the enforcement actions to  
24 deal with the two or three or whatever number of problems  
25 there are.

1           In each case, you could have examples that fit and  
2 demonstrate where the weaknesses are or where the problem  
3 was. I want to make sure that our enforcement action and  
4 letters and everything point to a clear understanding of  
5 what it is the licensee really has to fix, what the  
6 wrongness is. That's the reason for that kind of language.

7           It does not suggest that if you had a laundry list  
8 and you could identify this whole laundry list and there are  
9 just too many things that are wrong such that QA is a major  
10 problem, but everything is in violation of Appendix B, with  
11 30 or 40 examples, that that all has to be treated as "one  
12 violation." No.

13           Again, two points are being made. One is the  
14 total of the enforcement action and the other is the civil  
15 penalty. But in all cases, trying to make sure that we got  
16 to the underlying problem or thing that was happening.

17           COMMISSIONER AHEARNE: Okay. I have to think  
18 about that a little bit. I understand the point you're  
19 making. I think it can be read somewhat differently. It  
20 can be read that you narrow it -- that it would be in the  
21 licensee's best interest to argue, yes, you found I  
22 committed 15 gross violations, however I just want to point  
23 out to you they all stem from this one instance.

24           MR. STELLO: Oh, no, no. That wasn't the intent.

25           CHAIRMAN PALLADINO: Or one individual.



1 COMMISSIONER AHEARNE: Right, and we fired him.

2 (Laughter.)

3 COMMISSIONER AHEARNE: You have a statement on  
4 page 12 that orders are made effective immediately whenever  
5 it is determined that the public health, interest or safety  
6 so requires. Now, I gather that stems from the fact that  
7 that's what the Administrative Procedures Act allows one to  
8 say when you make an order effective immediately. I just  
9 wondered whether you had a working definition of the "public  
10 interest"

11 MR. STELLO: No. Whenever there is a need to get  
12 involved with balancing, that's already another one of those  
13 reasons, and then we come back to the Commission if we're  
14 going to do that. The balance of those other factors will  
15 be part of the process by which the Commission got  
16 involved.

17 MR. MURRAY: Is that the one that you sent --  
18 shutting down construction in order to get a handle on the  
19 problem, you tend to lean on public interest because it's  
20 difficult to lean on immediate threat to public health and  
21 safety.

22 COMMISSIONER AHEARNE: Now, since you raise that,  
23 would you expect to be able to read through this document  
24 and come up with a conclusion when we would have immediately  
25 effective suspension of the CP, or would you go elsewhere to

1 try to find those guidelines.

2 MR. STELLO: I think after reading the document  
3 all you would do is have some sort of fair idea of what that  
4 would do. In terms of any detailed explanation, you can't  
5 have it in the policy. I don't know that you can write it  
6 to do that.

7 COMMISSIONER AHEARNE: It wasn't clear to me,  
8 other than this one particular area, that I could find any  
9 guidance on when you would take action for immediate  
10 suspension of the CP.

11 MR. STELLO: I think Table 2 gives some specific  
12 guidance as to that. If you fall within Table 2, that is  
13 very specific.

14 COMMISSIONER AHEARNE: Say that again? Now that  
15 is one I guess you conclude that D or C -- is that it? C or  
16 D?

17 MR. STELLO: Those are orders. D is just any  
18 further action, which could be any one of a number of  
19 things. Those start to indicate when the orders would issue  
20 and under what set of circumstances.

21 COMMISSIONER AHEARNE: Yeah, but I guess it would  
22 have to be D, because C is a show-cause. As you know, we  
23 have before had problems with when do you issue an  
24 immediately effective suspension of a CP.

25 MR. STELLO: It's a very difficult area. If you

1 knew they were going to start construction and they were  
2 going to pour an awful lot of concrete that might cover it  
3 up and you couldn't get the licensee to agree to hold that  
4 until it was resolved, then I think the public interest  
5 would warrant having an order to go out immediately  
6 effective and you would consider it. And there are those  
7 kinds of examples one would have. But --

8           COMMISSIONER AHEARNE: On page 13 under "related  
9 administrative actions," you say: "The NRC expects  
10 licensees to adhere to any informal obligations." What is  
11 an informal obligation?

12           MR. STELLO: We have a meeting with him and he  
13 tells us that he won't start up the plant until the  
14 following things are done and he'll call us up and let us  
15 know. We expect he's going to do that. And any time we  
16 have a belief that he's not, then what we're going to do is  
17 make those a condition of order.

18           COMMISSIONER AHEARNE: But the message that you  
19 would expect the licensee or the public to get from this  
20 section is that if the licensee makes a commitment, a verbal  
21 commitment, I guess, is an informal -- well, it's not quite  
22 binding. But if he doesn't follow through, then you will  
23 follow with an order to make it binding.

24           MR. STELLO: Yes. An immediate action level -- an  
25 immediate action letter is written, and if he doesn't wish

1 to follow, we're prepared to go with an order.

2 COMMISSIONER AHEARNE: Okay. On page 15 you have  
3 the administrative review of civil penalty and other  
4 orders. You have that the reviewing authorities -- and I  
5 guess that you are assuming the board and the boards -- at  
6 that stage shall independently apply the enforcement  
7 policy.

8 Why shouldn't they -- I guess it's more a question  
9 to Bill. Why aren't you proposing that the boards be  
10 somewhat bound by the enforcement policy?

11 MR. DIRCKS: I don't make any proposals regarding  
12 the boards.

13 COMMISSIONER AHEARNE: No, this is -- you're  
14 intruding into an area of administrative review and you're  
15 essentially saying your proposal is that the boards  
16 independently apply the enforcement policy.

17 MR. BICKWIT: This doesn't say anything about not  
18 being bound by it. It simply says that they apply it  
19 independently of the application of it by the Director.

20 MR. MURRAY: May I just go on to add, that is  
21 exactly what was done by the Appeal Board in the Atlantic  
22 Research case.

23 COMMISSIONER AHEARNE: Oh, I know it well.

24 (Laughter.)

25 MR. MURRAY: And that was the guidance we were

1 taking, since the Commission approved the Appeal Board's  
2 action in that regard.

3 COMMISSIONER AHEARNE: But I thought this was the  
4 EDO's proposed enforcement policy.

5 MR. DIRCKS: We're asking for Commission  
6 endorsement of it.

7 COMMISSIONER AHEARNE: Yes. But I'm asking  
8 whether that is the approach that you believe ought to be  
9 done by the boards.

10 COMMISSIONER GILINSKY: What page are you on now?

11 COMMISSIONER AHEARNE: Page 15, section 7.

12 For example, the boards could review for issues of  
13 fact and abuse of discretion. That would be a possibility.

14 MR. MURRAY: It was just pointed out to me that  
15 there will be de novo review of these decisions in court,  
16 even when the Commission makes them. And therefore it might  
17 be argued the boards ought to have that authority as well.

18 COMMISSIONER AHEARNE: It might be. It also might  
19 be argued that the boards ought not to have that authority,  
20 de novo authority.

21 MR. DIRCKS: I don't think they should.

22 COMMISSIONER AHEARNE: Well, I expected that and I  
23 was surprised that this recommended policy didn't have --  
24 could you consider that?

25 CHAIRMAN PALLADINO: You mean sometimes the

1 guidance that the Commission gives should not be followed?

2 COMMISSIONER AHEARNE: No, no, no. This is the  
3 board, when the board reviews this.

4 CHAIRMAN PALLADINO: But I thought this came from  
5 an earlier Commission guidance.

6 COMMISSIONER AHEARNE: Well, this section was, I  
7 believe, a new section that was added to the enforcement  
8 policy and the guidance for that was from one experience.  
9 But it was not part of the previous --

10 MR. MURRAY: The facts in that case for Atlantic  
11 Research, Commissioner Gilinsky, a radiographer had failed  
12 to do a lot of things. He disconnected an interlock and  
13 overexposed himself and some others. The issue was whether  
14 management was involved in that, because the management  
15 contended they hadn't given this individual any instructions  
16 to defeat the interlocks. In fact, they ordered him to do  
17 just the opposite.

18 We contended before the Appeal Board and the  
19 Commission held, and the Appeal Board and the Commission  
20 held, that we could impose a civil penalty notwithstanding  
21 the lack of direct management involvement. There was an  
22 aura of management involvement to the extent that they  
23 allowed the individual to act as he did, reflecting on the  
24 comment that you made earlier.

25 But the issue as it fits here is simply, what did

1 the Appeal Board have to do with our enforcement policy, and  
2 they held that they could look at the enforcement policy on  
3 their own and decide what penalty to come to. They were not  
4 simply reviewing the Director's decision on the basis of  
5 abuse of discretion.

6 The Commission upheld that and we took that to be  
7 the guidance to follow in this case.

8 MR. BICKWIT: But they are still bound to the  
9 enforcement policy under that language.

10 COMMISSIONER AHEARNE: Yes, I guess I would like  
11 to have it expanded a little bit.

12 MR. BICKWIT: I understand your point. I think  
13 it's a separable one from whether they are bound to the  
14 enforcement policy.

15 COMMISSIONER AHEARNE: Remembering very well that  
16 whole Atlantic Research thing, I wouldn't mind if they were  
17 bound a little more tightly to any enforcement policy the  
18 Commission ends up deciding on.

19 COMMISSIONER BRADFORD: I don't see how you can  
20 bind them without going back to the earlier contention that  
21 this isn't the regulation.

22 MR. BICKWIT: They are bound to the policy to the  
23 same extent the staff and the Commission are bound to it. I  
24 don't see how you can read it any differently than that.

25 COMMISSIONER AHEARNE: And let me -- Atlantic

1 Richfield and the Atlantic Research one still bothers me.

2 MR. BICKWIT: I don't blame you, and you can deal  
3 with that question. It's just a different question, the  
4 extent to which they're bound to this policy.

5 COMMISSIONER GILINSKY: What is it you would like  
6 to see happen, John?

7 COMMISSIONER AHEARNE: I think the board ought to  
8 review for facts and for abuse of discretion.

9 COMMISSIONER GILINSKY: So they can say either yes  
10 or no, is that the idea?

11 COMMISSIONER AHEARNE: They can say yes or no on  
12 facts or yes or no on the abuse of discretion.

13 COMMISSIONER GILINSKY: You don't want them to  
14 --

15 COMMISSIONER AHEARNE: I don't think they ought to  
16 be doing a complete review of the whole thing.

17 COMMISSIONER GILINSKY: Are you troubled by their  
18 changing the penalty?

19 COMMISSIONER AHEARNE: I'm not sure on that one.

20 COMMISSIONER GILINSKY: I'm just trying to  
21 understand.

22 COMMISSIONER AHEARNE: I tried to get some more  
23 background on section 7 and I found that there really wasn't  
24 that much. It all led back to this one case. And I think  
25 the staff has done very well, given that one data point, to



1 construct a section.

2           Only one last question and it goes to supplement 6  
3 -- or 4, rather, severity categories. We're talking about  
4 health physics. And it really doesn't have to do so much  
5 with health physics, but let me pick on the footnote. You  
6 have a footnote and you have the personnel overexposures and  
7 associated violations incurred during a lifesaving effort  
8 will be treated separately from the policy. And I think  
9 elsewhere in the policy you have a sentence alluding to  
10 that.

11           I agree with that. Let me ask a different  
12 question. During an accident, what if the licensee is faced  
13 with the issue of violating a regulation in order to take an  
14 action that will, in the licensee's best judgment, alleviate  
15 the accident?

16           MR. STELLO: We are going to propose -- I don't  
17 know the status at the moment -- a change in the regulations  
18 that would in fact make that clear to the licensee, that it  
19 is expected that he would do that afterwards.

20           COMMISSIONER AHEARNE: Okay, because just sitting  
21 here on this enforcement policy, it reinforces that --

22           MR. STELLO: We're trying to change the regulation  
23 that that would be the Commission's, in fact, requirement  
24 for that --

25           COMMISSIONER AHEARNE: But you are addressing

1 that?

2 MR. STELLO: Yes.

3 CHAIRMAN PALLADINO: You don't want his medal of  
4 honor to be presented in jail.

5 (Laughter.)

6 COMMISSIONER BRADFORD: I wasn't taking issue with  
7 your comment, Joe. But it's one thing to state it in an  
8 obvious form, which is, if it's essential to prevent the  
9 accident from getting worse, of course we expect him to do  
10 what's necessary. But you're much more likely to get gray  
11 areas floating around, and what you're really going to be  
12 deciding after the fact is whether the licensee behaved in a  
13 reasonable manner even if he wound up in violation of the  
14 regulation.

15 And then what's more likely to come into play is  
16 some sort of prosecutorial discretion as to what one wants  
17 to do about it. I want to see this action, but I don't  
18 think it ought to be couched as a blanket waiver of the  
19 regulation when things get sticky.

20 MR. STELLO: There's a regulation for that purpose  
21 and that would be the time to try to make that balance.

22 CHAIRMAN PALLADINO: I think Victor had a  
23 question. Incidentally, on the way I turned to a page, page  
24 4, enclosure 4, you had enclosure as severity level three  
25 and you had it in an Arabic number instead of a Roman

1 number. And it's those sort of things that confuse me and  
2 makes me think there's something I didn't catch.

3 COMMISSIONER AHEARNE: One of the commenters  
4 suggesting going from Roman numerals to Arabic numbers, and  
5 our response was we agree.

6 CHAIRMAN PALLADINO: Well, whatever way you go,  
7 don't change them in midstream.

8 COMMISSIONER BRADFORD: That's another one of  
9 those Commission comments that comes back and winds up being  
10 data points.

11 (Laughter.)

12 CHAIRMAN PALLADINO: I know you didn't intend to  
13 be inconsistent, but --

14 COMMISSIONER GILINSKY: I've just got a brief  
15 question, because I get hungry around this time. But on the  
16 Supplement 3 on safeguards, it looked to me like you had  
17 some items of rather widely varying importance in severity  
18 one. Let me ask you first, when you say -- do you have it  
19 there? -- an act of radiological sabotage or actual theft,  
20 loss or diversion, when you say loss that means what? Does  
21 that mean that we have actually concluded that there is a  
22 loss or a mismatch on the books or what?

23 MR. STELLO: An actual loss.

24 COMMISSIONER AHEARNE: It's not just an inventory  
25 difference? It's an actual loss?

1 MR. STELLO: Right.

2 COMMISSIONER GILINSKY: We're convinced there is X  
3 kilograms of material floating around somewhere.

4 MR. STELLO: Yes.

5 COMMISSIONER GILINSKY: I must say, the actual  
6 theft or diversion as far as I am concerned is a different  
7 stratosphere. I mean, that's a whole different world. And  
8 if you compare it with another item, which is entry of an  
9 unauthorized individual into a vital area -- would that be  
10 somebody who isn't supposed to be in the reactor control  
11 room?

12 MR. STELLO: He doesn't have authorization at all  
13 to have gotten into the vital area and he got through all  
14 the vital areas, from the barrier outside of the plant.

15 COMMISSIONER GILINSKY: I see. How far would he  
16 have to get into the plant to qualify for this?

17 MR. STELLO: Into a vital area.

18 COMMISSIONER GILINSKY: And that's what?

19 MR. KEPPLER: There are at least two barriers,  
20 going through the normal entry of the outside and then  
21 getting past the protective feature.

22 COMMISSIONER GILINSKY: The turbine area would not  
23 be such a vital area?

24 MR. KEPPLER: It is not.

25 COMMISSIONER GILINSKY: It is not.

1 COMMISSIONER AHEARNE: Would that include an NRC  
2 inspector who was trying to test the system?

3 COMMISSIONER GILINSKY: Well, when you say outside  
4 the protected area, the protected area is the entire plant.

5 MR. STELLO: Yeah. If he didn't use his  
6 identification in any way, shape or form. Or was it his  
7 recognition to someone unknown or strange, yes.

8 COMMISSIONER BRADFORD: With regard to severity  
9 one, in plants under construction, why do you require that  
10 the system be completed?

11 MR. STELLO: That's the discussion that we had.

12 COMMISSIONER BRADFORD: I'm sorry. If you covered  
13 it, please forgive me. I was considering the Commission  
14 comments were buried in that supplement 3.

15 MR. STELLO: Let me conclude by saying we're going  
16 to go back and try to deal with seeing if there's some  
17 language that could be used.

18 COMMISSIONER BRADFORD: Did you also deal with the  
19 top of page 6, which seems to make no sense? This is the  
20 sentence on the top of page 6 that I can't make heads or  
21 tails of.

22 COMMISSIONER AHEARNE: They're picking up your  
23 comments.

24 (Laughter.)

25 COMMISSIONER BRADFORD: Which one?

1           COMMISSIONER AHEARNE: On the top of page 6. On  
2 page 3, section 3, I think they say this was modified to  
3 pick up your comment.

4           COMMISSIONER BRADFORD: Yeah. But read that  
5 sentence and try to tell me what that actually means.

6           COMMISSIONER AHEARNE: Oh, that's different.

7           (Laughter.)

8           COMMISSIONER BRADFORD: I would prefer to have my  
9 comments picked up in a way I can understand.

10          MR. DIRCKS: Why don't we just have somebody work  
11 on that.

12          COMMISSIONER BRADFORD: There must be a number  
13 missing. NRC normally considers civil penalties only for  
14 similar violations that occur blank, from the date, period  
15 of time.

16          MR. STELLO: From the date of the last  
17 inspection.

18          COMMISSIONER BRADFORD: You mean after the date of  
19 the last inspection?

20          MR. STELLO: Yeah, or within two years, whichever  
21 is greater.

22          COMMISSIONER BRADFORD: The "from" means "after,"  
23 or is there a period of time that's missing before the word  
24 "from"?

25          MR. STELLO: It's between the two inspection

1 periods, that compared to two years, whichever is greater.

2 We'll fix it.

3 COMMISSIONER BRADFORD: Okay.

4 CHAIRMAN PALLADINO: Now, I gather there are some

5 changes you're going to make to this and we'll be seeing

6 either the revised version or a page that identifies the

7 changes, and we can vote on that when we receive it.

8 MR. BICKWIT: Mr. Chairman, our office has a

9 number of comments with respect to that.

10 MR. STELLO: You're going to provide them to us, I

11 hope.

12 MR. BICKWIT: That's what I meant by saying that.

13 CHAIRMAN PALLADINO: Okay. Thank you all for

14 coming. We stand adjourned.

15 (Whereupon, at 12:30 p.m., the Commission was  
16 adjourned.)

17 \* \* \*

18

19

20

21

22

23

24

25

NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

COMMISSION MEETING

in the matter of: DISCUSSION OF NRC ENFORCEMENT POLICY

Date of Proceeding: October 28, 1981

Docket Number: \_\_\_\_\_

Place of Proceeding: Washington, D. C.

were held as herein appears, and that this is the original transcript thereof for the file of the Commission.

Ann Riley

Official Reporter (Typed)



Official Reporter (Signature)