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REGION II
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MEMORANDUM FOR: E. P. Wilkinson, Chairman, Advisory Committee for
Review of Enforcement Policy

FROM: F. J. Long, Technical Assistant to the Regional
Administrator

SUBJECT: FEDERAL REGISTER NOTICE JANUARY 9, 1985
AD HOC ADVISORY COMMITTEE FOR REVIEW OF ENFORCEMENT POLICY;
REQUEST FOR WRITTEN COMMENTS

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This memorandum is in response to the request for comments published in the January 9, 1985, Federal Register. My comments are not intended to represent the views of Region II. I have previously requested and still desire an opportunity to address the Commission and/or the Advisory Committee regarding NRC enforcement policy and practices.

Enclosure (1) contains brief comments in response to specific questions in the FRN. Enclosure (2) contains additional comments on questions raised by the Advisory Committee. Additional related comments are contained in Enclosures (3) through (5). Compounding enforcement problems is the fact that there are effectively four separate enforcement policies under consideration at the present time. In addition to the basic policy, there is a policy on Material False Statements, a Policy on Vendors and a Policy on Fire Protection. It is presumed that these four policies will eventually make up a new basic policy of Part 2 Appendix C and will have been reviewed by the Advisory Committee beforehand.

Attention is invited to the fact that I served on the task force that developed the policy published in March 1982 and feel competent to comment on the original intent of the policy and subsequent experience in its use. Because the March 1982 policy was never used as intended, I question the validity of claiming experience gained in use of that policy as a basis for the changes proposed or incorporated in the March 1984 policy. The March 1984 version was a more negative policy and like the original policy has not been implemented as intended.

To begin with, the March 1984 policy changes were not minor as stated in the FRN. They were extensive and appear to have been designed more to support past arbitrary practices rather than address the serious problems actually encountered. If we are to head off serious safety consequences, an entirely new approach to enforcement will be necessary, including provisions in the policy for ensuring compliance by NRC managers and prohibiting wholesale deviation from the policy. Obviously, the effectiveness of any policy cannot be measured if the policy is not implemented in the intended manner.

If the Commission is very serious about safety, then it will consider as many positive incentives as can be developed to encourage licensees to find and

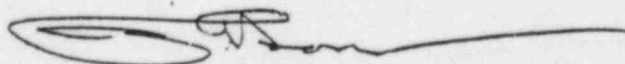
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correct violations without fear of punishment. At the same time, NRC will also consider abolishing all negative incentives. By punishing licensees for finding violations, disgruntled employees may be encouraged to "set up" safety violations either to seek recognition for "finding them" or to "get even" with their employers. The NRC record is not good in this regard, since the vast majority of escalated enforcement cases are the results of licensee identified and reported violations for which NRC deserves little or no credit. The fact is, the more effective a licensee's program for finding, correcting and reporting violations, the more escalated enforcement he will be subjected to, the worse will be his enforcement history, and the worse will be his SALP rating. This will be in spite of the possibility that this licensee's facility could be the safest of all, the licensee having found and corrected those violations.

The case record will show that escalated enforcement has been essentially punitive and arbitrary. This is demonstrated by extreme nonuniformity and diverse treatment in similar cases. Ultimate Severity Levels and the number of separate violations are often determined after a civil penalty amount has been arrived at. Although Federal law places a limit of \$100,000 per violation per day on civil penalties, it appears this limit is being routinely circumvented. Likewise the \$100,000 limit is routinely imposed for Severity Level III violations, equaling the most severe penalty (Level I) and exceeding the second most severe (Level II). As an example, in one case, a Severity III violation was described as so serious that the maximum penalty was imposed. This is totally contrary to the purpose of assigning a Severity Level. Another significant deviation from policy is the practice of aggregating violations to produce a higher Severity Level. This is not a provision of the policy except where willfulness is a factor.

I will be happy to discuss these comments directly with the Advisory Committee.



F. J. Long

Enclosures:

1. Comments on FRN 1/9/85
2. Comments on Enclosure
to SECY 84-479
3. Memo dtd 12/14/81 to
J. O'Reilly
4. Memo to files
dtd 11/05/84
5. Statement

ENCLOSURE 1

Enforcement Policy Comments

Group 1

1. The required QA programs are adequate and do in fact result in licensees finding and correcting problems. What is missing are the positive aspects whereby licensees can avoid escalated enforcement by virtue of having effective programs. The policy has been negative in this regard.
2. Most violations which are reported, are only reported because of specific reporting requirements for the events. Events may either be caused by violations or they may result in violations. All violations are not in themselves reportable.
3. Violations appear to have been reduced in number; however, "escalation of enforcement" cases remain high, due to more stringent interpretations and application of the policy as well as circumvention of policy.
4. No industry can equal the safety record of the nuclear industry. Much of the public perception of nuclear safety comes from the media, not from the existence of real safety issues. NRC over reactions to events likewise may cause some undue public concern about safety. Over enforcement, unnecessary escalation, and our overreaction to minor violations contribute to perceptions of poor safety records.

5. The policy as implemented, definitely has had and continues to have an adverse affect on licensee and employee morale. This is particularly true of licensed operators who are still bidding out of nuclear plants. What employee enjoys reporting a violation if his employer is going to be hit with a massive punitive fine plus incur the wrath of the public service commissions?
6. The general public has little, if any, knowledge of NRC enforcement policy. Licensee employees and their families have reduced confidence in the policy. Many NRC employees also have reduced confidence in the policy. The only confidence expressed publicly is expressed by the media and intervenors when enforcement pleases them and creates headaches for a specific licensee.
7. Experience shows that disgruntled workers and exworkers are all too willing to make allegations. Members of the public (other than antinuclear groups and disgruntled former employees) seldom if ever make allegations. The better and more loyal employees report violations to their management first. The enforcement policy as implemented actually is a negative influence in this regard.

Group 2

1. The civil penalty levels are not appropriate. The same severity levels do not have the same safety significance in different functional areas.

Materials licensees have much harsher treatment. LSA is supposed to be harmless but civil penalties are common for relatively minor safety problems. Also since most civil penalties for Severity III violations exceed the penalties for Severity I or II, why have a table? Most civil penalties are arbitrary, anyway. The Severity III violation is the worse since the civil penalties average many times higher than all other severity levels.

2. Adjustments are mostly upward. It is extremely easy to adjust a penalty upward but extremely difficult to adjust it downward. These adjustments are arbitrary in most cases. Terms like "only minimally acceptable" corrective are used frequently to avoid reduction while "extensive corrective actions" which often are beyond necessity, are commended. Corrective actions should be adequate, not far beyond necessity, as a condition of mitigation.
3. The most severe classification is typically used. Although the policy accommodates severity classification adequately, many examples of excessive severity level selection exist. Supplements VII and VIII contain examples of severity levels which are extremely over classified.
4. The MFS policy needs a complete reversal. The VEPCO standard should be abolished. The term MFS should only apply to deliberate cases whether oral or written. No escalated enforcement however should ever result from honest errors or omissions. Although theses may justifiably be labelled violations, they should be of severity level that would preclude routine escalated enforcement action.

5. Negative incentives are overemphasized while positive incentives are minimal.
6. There is no set progression of enforcement sanctions in practice, as described in the policy. The policy shows an order to be more severe than a civil penalty. However, the two sanctions are often reversed and likewise, both sanctions are often applied initially without clear justification for not using the progression policy. Another problem is in cases sent to DOJ for possible criminal action. Referral to DOJ should be a type of progression, but instead it is always in addition to punitive actions taken before or after the DOJ referral or DOJ disposition.
7. The enforcement conference is a desirable feature of policy and in itself, is a deterrent to most violations because it is costly to send managers away from their responsibilities--costly in time and money. However, the enforcement conference is utilized in practice more to set up escalated enforcement actions than to understand and evaluate corrective measures. We should instead, consider foregoing punitive fines following most enforcement conferences unless the proposed corrective measures are inadequate or known to be ineffective.

News releases are actually punitive as are fines in many cases. It is unlikely that licensees will look at the scheduling of news releases as being anything other than self-serving and punitive.

8. Supplement VIII, to my knowledge, was not reviewed in the Regions. It was one of numerous, so-called minor changes to the policy. It is entirely inappropriate in the way it is written and contains examples of violations which in no way bear the safety significance of assigned severity levels. It gives the impression that under or over classifying are equally serious and there is no way the licensee can win. Likewise, the wording appears to have been selected to protect NRC from criticism during or following a plant emergency.

Group 3

1. For willful violations, licensed individuals should be punished by license suspension or revocation, depending on degree of materiality. Civil penalties should never be used by NRC against individuals. For criminal actions, referral to DOJ is appropriate and adequate. Likewise, licensees should generally not be punished for deliberate acts of their employees.
2. Regionalization has had essentially no effect on enforcement since this function has not been regionalized and is retained under Headquarters control on all enforcement escalation. Considering the tight control exercised by IE, enforcement should be relatively uniform. To the contrary, however, nonuniformity has resulted mostly from the diverse treatment of similar cases by IE.
3. The stated root causes are mostly speculative. They are seldom validated. Within documentation packages on single cases, the root causes may often be

conflicting and meaningless. The stated cause may often be no more than a cliché'.

Lessons learned, if any, are seldom formally promulgated to the industry as such. All licensees probably review all significant enforcement actions but it is questionable whether any lessons to be learned are clear.

4. Licensee self-identification has never been a problem. Essentially all serious violations are in fact identified by the licensees, corrected and reported. Unfortunately, most escalated enforcement results from these/ licensee-identified and reported violations. Greatly increased reliance can and should be placed on licensee initiatives in this area; however, with reasonable assurance that NRC will not stifle enthusiasm by prompt escalation of enforcement. Theoretically, the more violations that are identified and corrected, the safer the plant will be.