



UNITED STATES
NUCLEAR REGULATORY COMMISSION
REGION II
101 MARIETTA STREET, N.W.
ATLANTA, GEORGIA 30323

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MEMORANDUM FOR: Files

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

SUBJECT: ENFORCEMENT POLICY

Having read the public comments on the enforcement policy published March 8, 1984, I am more convinced than ever that a major change in direction is needed. We previously prepared comments on a proposed new Manual Chapter 0400 on enforcement. Manual Chapter 0400 appeared to be designed to cast in concrete, the past arbitrary practices rather than address the public comments necessary to remedy the serious problems encountered over the past several years.

My evaluation of the public comments was that they appeared well intended, thoughtful, and substantive. The comments generally described the new policy as more negative and seriously lacking in positive safety incentives. Many questioned the extensive use of punishment in the form of civil penalties as the only incentive NRC utilizes to assure compliance.

I urge the Commission to look hard at its enforcement policies and the adversary nature of its enforcement actions. I strongly recommend a major change in direction toward safety assurances and away from self-serving practices which are not conducive to plant safety.

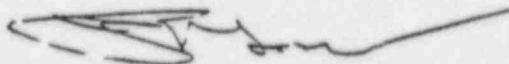
I firmly believe our enforcement practices have the opposite effect of improving safety. In fact, I believe we are creating serious safety problems by destruction of licensee employee morale and driving the best people out of the business.

The practices we employ to implement enforcement policy can best be described as being designed to assure more and bigger civil penalties, not so much to assure safety. The actual safety significance of any given violation is rarely evaluated as the first step in the enforcement process. To the contrary, decisions to impose most civil penalties are made as the first steps in the process.

The most serious offense we have committed is publishing a policy and then circumventing that policy to the disadvantage of the licensee. The so-called evaluation of experience in use of the policy was totally invalid because the policy was not implemented in the way was intended. The policy has not worked well as stated in the SECY paper. Statements made in numerous speeches by top NRC managers as well as various issues of the PPG have been essentially ignored in implementation of the policy. Many of the more significant enforcement cases have included arbitrary factors not discussed in or intended by the policy. Not only are policy provisions routinely circumvented, the basic provisions of the

Atomic Energy Act with regard to maximum civil penalties are routinely circumvented. These conditions all stem from decisions to impose a civil penalty of a certain dollar amount as the first step in the enforcement escalation process.

The adjustment factors for increasing civil penalties are used freely to justify bigger penalties while the factors for mitigating penalties are used sparingly.



F. J. Long

ENCLOSURE 5

STATEMENT ON ENFORCEMENT PRACTICES

F. J. Long

This statement is being made because of possible serious consequences associated with NRC enforcement practices and I believe the Commission would benefit by a different point of view. My comments are intended to be constructive, hopefully leading to improving a serious gap in NRC credibility regarding enforcement practices. My concerns have been expressed many times via normal channels for the past several years. However, the arbitrary and adversarial aspects of enforcement have become much more pronounced, making serious safety consequences more likely. In particular, since very large punitive fines are being routinely imposed for licensee identified and reported safety violations, licensee employees may avoid reporting of serious violations which if reported, would almost certainly create problems for their employers. Likewise, there are strong incentives for employees to "set up" violations either to get even, or to gain recognition by "finding" the violations after setting them up.

The most serious problem is what appears to be total NRC disregard of the words and intent of published policy in imposing civil penalties and arriving at adjustments to base penalties. Civil Penalties and adjustments to the base civil penalties should be based on provisions of the policy, not on some unknown arbitrary criteria. I do not object to maximum penalties being imposed provided the penalties are arrived at by logical, uniform applications of the policy. However, it is clear that civil penalties are established and imposed, not by application of the policy, but rather by arbitrary predetermination of dollar

amounts and forcefitting of the citations to fit the predetermined penalties. This process presents a dilemma for both the NRC Regional staff and the licensees because it is impossible to understand the reasoning employed. In many cases, civil penalties bear absolutely no resemblance to guidance contained in published policy, and the reasons stated for escalation of penalties bear no resemblance to the violations. This should be an embarrassment to the Commission. Since NRC policies seldom contain restraints on NRC management deviation from policy is routine. This is particularly evident in enforcement.

A practice that ties in closely with the above is finalizing of inspection reports after civil penalty actions are proposed. In some cases, words are added or perhaps changed to support the arbitrary wording of civil penalty letters and Notices of Violation. What can and has happened is that licensees find that the inspector's report does not support the statements in the civil penalty package. Additionally, the licensee often has not previously been apprised of the specific serious concerns the NRC has expressed in the civil penalty letters.

Another serious problem is the routine punishment of licensees who find and report violations. The more they report, the bigger the civil penalties. The better the self audit program, the worse the enforcement history. This practice is a negative incentive to licensees to improve their self audit programs. A serious safety problem is created in that licensees may decide they would be better off not to look for violations in the first place, and wait for NRC to find them. The punishment is no worse when NRC finds the violations than when the licensees find them. If the NRC objective is truly to ensure protection of the health and safety of the public, then every available positive incentive should be used by NRC to encourage licensees to identify, correct, and report

violations. By the same token, all negative incentives should be totally eliminated.

One major problem I believe the Commission should be aware of is the fact that we routinely circumvent the legislation fixing the maximum penalty per violation per day. The Commission requested Congress to raise the maximum penalty from \$5,000 to \$100,000 per violation and this was granted. Subsequently, however, it became clear that the legislation could easily be circumvented by eliminating the single event concept and adding up contributing and resulting violations. By this procedure, there is no limitation on civil penalties, making the statutory limit meaningless.

The single event concept was originally adopted in order to focus attention on the root causes of problems for enforcement purposes. However, this policy provision is seldom utilized since it would generally result in only a \$100,000 maximum penalty. Consequently, the focus of attention is placed back on the individual violations by treating contributing and resulting violations as separate or groups violations and imposing a \$100,000 fine for each.

When I read the new policy, I found it a remendous disappointment in that it addresses very few of the basic problems which have been experienced, while more reasonable features of the old policy were watered down or abolished. The new policy appears more designed to ensure continued headquarters control of all future escalated enforcement actions, and perpetuation of existing practices. Nonuniformity is assured for the foreseeable future, by making continued arbitrary actions more certain and much easier. I am concerned that NRC does not follow through on statements made to the public regarding policy. As an example,

NRC management has publicly expressed concern over the possible negative impact of certain regulatory actions on the nuclear industry. Many NRC management speeches have included comments on this subject, seeking to draw favorable attention to NRC plans to counteract the problem. These same speeches have discussed the incentives contained in NRC enforcement policy, for licensees to find, correct and report violations. Meanwhile, NRC enforcement practices remain punitive and adversarial, widening the gap between NRC and the licensees.

Theoretically, revisions to the enforcement policy were based on experience gained from application of the policy which was published in the Federal Register, March 9, 1982. Since enforcement practices have by no stretch of the imagination, been fully in accordance with that policy, the experience claimed is not valid. Although all escalated enforcement letters contain standard words which say the enforcement is in accordance with published policy, the fact is, the enforcement is rarely in accordance with that policy. Furthermore, the new policy appears designed to justify extensive deviation from the published policy in the past. In any case, it does little good to change the policy or even have a policy, if it is not going to be used as intended.

I am concerned that extremely non-uniform, arbitrary imposition of civil penalties, could create a dangerous safety condition. There are now more safety violations than ever, and managers and employees at nuclear facilities are continually on edge, fearing that one simple mistake will destroy their careers. Conditions like this are not conducive to safety, and could eventually lead to a serious accident. I certainly would not be comfortable on commercial airliners where the flight crews were under similar stress.

The only visible means by which NRC obtains compliance, is the civil penalty and occasionally, a belated order. Considering recent and current cases in process, nearly all licensees have been or will be, subjected to punitive fines. This is not a valid measure of how well the NRC is performing, nor how poorly the industry is performing. Enforcement practices are clearly self serving. If the same arbitrary standards were applied to NRC management that NRC applies to licensee management, there would be numerous NRC management vacancies. Apparently no one expects, much less demands, the highest standards for NRC management. There are no independent management consultants periodically evaluating NRC while managers in the industry are continually under NRC pressures to improve performance. If the objective of the NRC was to convince the public that nuclear plants are dangerous, no better job of convincing could be done than by NRC enforcement practices.

Needless to say, I, like many others in NRC, am supportive of nuclear power or I would not have spent the past 30 years in nuclear work. This does not mean I am not concerned with nuclear safety enforcement. I am pro-commercial airlines, but, I also strongly support enforcement of safety standards and rules for the airlines. I do not, however, support escalated enforcement for reasons other than violation of regulatory requirements. I do not object to escalated enforcement consistent with approved and published policy, no matter how tough it is. But I do object to intentional or careless disregard of that established policy by staff personnel. I do not think we should be playing "can you top this" games with enforcement.

To be more specific, there are a number of very serious problems with implementation of the NRC enforcement policy. Some of the worse examples are the following:

1. Civil penalties are now so routine and so frequent that they pose a serious threat to nuclear plant safety. Not only is this destructive of licensee and NRC morale, it convinces the general public that nuclear plants are dangerous, and supplies the antinuclear element with ammunition they need to attack the industry. I fear we are laying the groundwork for another accident.
2. Many civil penalties, including the larger ones, have been for violations identified and reported by licensees. This is a serious reflection on NRC performance. This gives the appearance that the shortcomings, inactions and lack of foresight by NRC management apparently are being covered up at the expense of the licensees. Little is being done meanwhile, to determine why NRC does not find these serious violations even though NRC has the lion's share of available nuclear experts. Many of the major civil penalties are indicative of failures of the NRC staff rather than of licensee management.
3. Although NRC had a reasonable enforcement policy on paper, that policy has essentially been ignored. In particular, provisions of the policy which offer incentives to licensees to do better, and which would result in uniform treatment, have generally been disregarded. The typical large civil penalty bears little resemblance to provisions of the published policy or to simple logic. Reasons appear to be dreamed up to justify predetermined large penalties, since the stated reasons, most often are not described in

the policy. I believe civil penalties should be issued only for significant violations of NRC requirements and that NRC managers should not have questioned freedom to deviate from the policy. I was at one time advised that NRC does not have to comply with its own policy and can do whatever it wants to do.

4. Two large civil penalties of record, have one thing in common. The problems involved inadequate surveillance programs. Although the problems were found to be widespread throughout the industry, civil penalties were not levied on the other licensees for the same violations. The two civil penalties were processed and issued while similar events were being reported from all over the country.
5. Civil penalties often are issued for reasons which are not clearly violations of NRC requirements. In at least one case, the civil penalty read like NRC had been disappointed because there were no overexposures on a steam generator replacement. The licensee was actually complemented in the enforcement letter for improvement of a prior good record. If no one was overexposed, the procedures must have been adequate; however, by dwelling on "potential for overexposure" and "inadequate survey," a civil penalty case was developed. This is what happens when the decision to impose a civil penalty is made as the first step in the enforcement process, contrary to the policy which says the first step is to determine the safety importance.

6. We continue to make a big case out of licensees violating their own requirements as opposed to NRC requirements. If a licensee procedure is more conservative than NRC requirements, NRC should not be concerned if a licensee falls short of his own goals as long as NRC limits are not exceeded. We frequently cite for inadequate procedures after events occur. Yet we seldom identify these same inadequacies during our procedure review process.
7. In one case I am familiar with, a large civil penalty was issued even though an NRR expert and others supported the view that the event had only minor safety significance. Later, when other violation resulted in a civil penalty, the first case was used as evidence of a poor enforcement history to justify a much larger fine.
8. One of the provisions of the policy was to give licensees credit for corrective actions on licensee identified violations. To avoid consideration of this credit, the term "minimally acceptable" was generated. Mitigation can then avoided because corrective actions were not taken far beyond necessity. This implies that NRC expects excessive, complex, and otherwise unnecessary actions as conditions of acceptance of corrective actions for mitigation. As far as I am concerned, either NRC requirements are met or they are not met.
9. The time to thoroughly evaluate licensee corrective actions on licensee identified violations is at the time the violations are reported and during inspections and enforcement conferences. This evaluation should determine whether a civil penalty is to be mitigated before it is issued. However,

these evaluations seldom mitigate the civil penalties. The civil penalty letters use standard phrases implying that NRC will review the licensee's responses to determine if the fine should be rescinded, mitigated, or impose. Again, the licensees' responses seldom result in mitigation. The licensee responses apparently are not evaluated, or at least not for the purpose of rescinding or mitigating the fines. Instead, the main objective clearly has been to impose the fine.

10. An example of disregard of the policy and arbitrary punitive action is a civil penalty case involving falsification of records. This event was determined to be a single Severity Level III violation and a penalty of \$100,000 imposed. There were obviously no policy provisions considered since it is not possible by the policy to go from \$40,000 to \$100,000 for a single Level III violation with apply certain factors. In the letter, a statement is made - "falsification of QC records is a serious offense." For this reason, but contrary to published policy, the maximum CP was imposed. The policy states that Severity Level I and II violations are \$80,000 and \$64,000. by categorizing the falsified records violations as a Level III, it denoted only "significant concern" and therefore by the policy, the fine would be \$40,000. A serious violation should be a Level I or II if a civil penalty greater than \$40,000 is justified, absent adjustment factors contained in the policy. It is therefore very clear, that this action was arbitrary and punitive, the amount of the fine predetermined, and words generated to justify that amount.

This same case is also interesting in that the required Commission notification, EN-83-26 contained a different and unique reason for the maximum (\$100,000) fine. The EN stated that the maximum CP was proposed "to indicate to other licensees that NRC will not tolerate falsification of records." This demonstrates that the Commission is not informed properly regarding enforcement actions as required.

It does no good to inform the Commission unless the Commission is accurately informed of all facts as well as deviations from the policy. The EN itself, in this case becomes a false record because it tells the Commission one thing while something was being done. NRC Managers should "pay meticulous attention to detail" as licensees are continually reminded they must do. Industry Managers can have their careers ruined for much less.

In summary, there is absolutely no common basis to be found in the policy for most civil penalties. In cases where the identified violations do not fully support apparently predetermined enforcement actions, irrelevant reasons are developed. The NRC continues to be an adversary of the nuclear industry contrary to its stated objectives. Rather than working with the industry to solve problems leading to safer plants, we are generating distrust, anxiety, and disrespect. The best interests of the public cannot be served by this condition. The real motives of NRC management are continually in question as so well put in the Charnoff/Hickey paper presented at the 1982 AIF Annual Conference. The net result of our enforcement practices would have to be evaluated as something less than improved safety, at best. At worse, these policies and practices, if continued, can lead to a major accident.