

NUCLEAR UTILITY GROUP
ON ENFORCEMENT

SUITE 700
1200 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20036
TELEPHONE (202) 857-9817

STATEMENT OF GOAL AND POLICIES OF THE
NUCLEAR REGULATORY COMMISSION
ENFORCEMENT PROGRAM

Submitted by:

The Nuclear Utility Group
On Enforcement
W. G. Council, Chairman

8505300092 841023
PDR FOIA
SAMP84-352 PDR

June 6, 1980

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. BACKGROUND	2
III. GOAL AND POLICIES OF THE NRC ENFORCEMENT PROGRAM	4
A. Goal of the NRC Enforcement Program	4
B. Policies of the NRC Enforcement Program	5
1. Search Out and Resolve Problems, Share Information, and Strive Toward Higher Standards of Safety and Performance	6
a. The Exchange of Information	7
b. Encourage Voluntary Corrective Action	10
2. The Need for Discretion	11
a. Revocation and Suspension	13
b. The Imposition of Civil Penalties	15
3. Penalties Should Be Remedial	24
4. Employment of the Most Capable Staff	30
5. Commission Involvement in Stringent Enforcement Actions	32
IV. CONCLUSION	33

I. INTRODUCTION

This statement is submitted by the Nuclear Utility Group on Enforcement ("NUGOE" or "Group") in response to the proposed NRC Enforcement Policy presented to the Commission by the Staff in SECY 80-139 (March 13, 1980). The statement fulfills the first commitment made to the Commission in a letter dated April 25, 1980, to Chairman Ahearne from legal counsel to the Group.

The Group consists of the Edison Electric Institute and the following 30 NRC power reactor licensees: Alabama Power Company, Arkansas Power and Light Company, Baltimore Gas and Electric Company, Boston Edison Company, Carolina Power & Light Company, Commonwealth Edison Company, Consolidated Edison Company of New York, Consumers Power Company, Detroit Edison Company, Duke Power Company, Duquesne Light Company, Florida Power and Light Company, Florida Power Corp., Georgia Power Company, Gulf States Utilities Company, Indiana & Michigan Electric Company, Long Island Lighting Company, Maine Yankee Atomic Power Company, Niagara Mohawk Power Corp., Northeast Utilities, Pacific Gas & Electric Company, Philadelphia Electric Company, Public Service Indiana, Southern California Edison Company, Texas Utilities Generating Company, Vermont Yankee Nuclear Power Corp., Virginia Electric and Power Company, Washington Public Power Supply System, Wisconsin Public Service Corp. and Yankee Atomic Electric Company.

The purpose of this statement is to present to the NRC what the Group perceives to be the proper goal of any NRC Enforcement Program and the policies upon which any such Program should rest. The statement is not designed to critique the Staff's proposed policy. That critique will be submitted along with our second statement. We trust that the Commission and Staff will afford thorough consideration to this statement and our upcoming statements, which are intended to provide maximum input at each stage of Enforcement Policy development.

II. BACKGROUND

On March 19, 1980, the NRC Staff met with the Commissioners to discuss the Staff's Proposed Enforcement Policy ("Proposed Policy"). That Proposed Policy was prepared by the Office of Inspection and Enforcement ("I&E") to reflect the Staff's reassessment of current enforcement policy and practices. During the March 19 meeting, the Commissioners inquired into several aspects of the Proposed Policy. They then directed that the Staff further evaluate the issues raised and revise the Proposed Policy consistent with this further evaluation and the views provided by the Commissioners subsequent to the meeting. We understand that the Staff is in the process of this evaluation and revision, and that it intends to resubmit the Proposed Policy to the Commission in late July.

On April 16, 1980, representatives of several NRC power reactor licensees and electric utility trade associations

met in Washington, D.C., to discuss the Staff's Proposed Policy. To initiate the organized industry effort agreed upon at that meeting, the Group informed Chairman Ahearne by letter dated April 25, 1980, that the Group had formed for the purpose of providing input to the Commission at each stage of Enforcement Policy development. The Group indicated that it would submit a statement of the underlying policies upon which it believed any NRC Enforcement Program should be founded. The Group also indicated that it would submit subsequently a proposed Alternative Enforcement Program and a detailed critique of the Staff's Proposed Enforcement Policy.

Accordingly, this statement presents our view of the proper goal of an NRC Enforcement Program and the policies upon which that Program should rest. By goal we mean the broad objective of the Program. By policies we mean general "building blocks" which should guide the construction of an effective and reasonable Enforcement Program so that the goal of the Program is achieved. In certain instances NUGOE also suggests guidelines which the NRC should to follow in translating our goal and policy into an Enforcement Program. The administrative mechanism used to implement the policies constitutes the actual Enforcement Program. The Staff's proposal is one example of such a Program. As noted, the Group is developing an Alternative Enforcement Program which we intend to submit to the Commission in July 1980.

III. GOAL AND POLICIES OF THE
NRC ENFORCEMENT PROGRAM

A. Goal of the NRC Enforcement Program.

The Group believes that the fundamental goal of the NRC Enforcement Program should be to promote practices on the part of power reactor licensees which will assure protection of public and employee health and safety and provide for the common defense and security. Every element of the Enforcement Program should be focussed on the achievement of that goal.

The NRC is charged by Section 3(d) of the Atomic Energy Act of 1954, as amended, with the responsibility of regulating the utilization of atomic energy "consistent with the common defense and security and with the health and safety of the public." 1/ This mandate to protect the public health and safety necessarily permeates virtually every aspect of power reactor licensing and regulation. 2/ NUGOE strongly believes that it is in both the public interest and the interest of each member of the Group that construction and operation of nuclear power reactors, and all other associated activities, are conducted within the highest levels of safety reasonably achievable. We recognize that meticulous attention to appropriate

1/ 42 U.S.C.A. §2013(d).

2/ Power Reactor Development Company v. International Union of Electrical, Radio and Machine Workers, 367 U.S. 396, 404 (1961); North Anna Environmental Coalition v. Nuclear Regulatory Commission, 533 F.2d 655, 665 (D.C. Cir. 1976).

detail 3/ and a high standard of compliance 4/ with statutory and regulatory requirements by power reactor licensees are ingredients which will contribute to a strong enforcement program designed to achieve the highest levels of safety.

We also agree with and accept the challenge inherent in the Commission's basic regulatory tenet that licensees have primary responsibility for protecting the health and safety of the public and their employees. 5/ Each member of NUGOE fully recognizes the scope and significance of its responsibility for the safe conduct of all activities associated with power reactors. We believe that an Enforcement Policy which promotes the safe utilization of power reactors will inure to the benefit of the general public and of each member of NUGOE.

B. Policies of the NRC Enforcement Program.

The Group has identified five policies upon which it believes any Enforcement Program must be founded. Some of these policies include issues raised by the Commissioners during the March 19, 1980 meeting. In summary, these policies are as follows:

3/ See In the Matter of X-Ray Engineering Co., 1 AEC 553, 555 (1960).

4/ In the Matter of Hamlin Testing Laboratories, Inc., 2 AEC 423, 428 (1964).

5/ See Higher Penalties Could Deter Violations of Nuclear Regulations, A Report by the Comptroller General of the United States, Feb. 16, 1979 ("GAO Report"), at 1.

1. The Enforcement Program should encourage licensees to initiate and maintain programs for searching out and resolving problems, for sharing information with other licensees and licensee-support organizations, and for striving toward increasingly higher standards of safety and performance.
2. The Enforcement Program should preserve the use of discretion by the NRC Staff and the Commissioners in initiating and pursuing enforcement actions.
3. Enforcement action should be remedial and only as stringent as is necessary to deter future similar violations. It should not simply punish licensees who violate statutory or regulatory requirements.
4. The Enforcement Program should contribute to an environment in which a licensee is able to attract and retain the most capable personnel.
5. The Enforcement Program should assure direct Commission involvement and decisionmaking when stringent enforcement actions are taken.

The basis and purpose of these policies are discussed seriatim below.

1. Search out and resolve problems, share information, and strive toward higher standards of safety and performance.

As discussed above, the goal of the Enforcement Program should be the promotion of practices on the part of power reactor licensees which will assure protection of public and employee health and safety and provide for the common defense and security. This goal will not be achieved simply by focussing on and requiring a literal compliance by

licensees with regulatory and statutory requirements. We do not mean to say that compliance with all regulatory and statutory requirements should not be emphasized as part of the Enforcement Program. However, we believe that it is equally if not more important that the Program also encourage the licensee to strive for a greater degree of safety in the construction and operation of power reactors. Accordingly, NUGOE submits that the Enforcement Program must encourage the voluntary and timely correction of potential dangers to safety by such licensees.

a. The Exchange of Information. One of the major lessons learned from the Three Mile Island experience is that the safe construction and operation of power reactors will be promoted if there is a voluntary exchange of information among power reactor licensees. The exchange of such information is vital if potential problems at similar facilities are to be known and the necessary safety measures taken. In this regard, the Report of the President's Commission on Three Mile Island ("Kemeny Commission") stated, "[t]here should be a program for the systematic assessment of experience in operating reactors, with special emphasis on discovering patterns in abnormal occurrences." 6/ Moreover, the Nuclear Regulatory Commission Special Inquiry Group recommended in its Report to the Commissioners and

6/ Kemeny Commission at 66.

the Public ("Rogovin Report") that a "systematic evaluation of operating experience must be undertaken on an industry-wide basis, both by the utility industry, which has the greatest direct stake in safe operations, and by the NRC." 7/ Industry has begun to voluntarily engage in such an information exchange under the auspices of the Institute for Nuclear Power Operations ("INPO") and the Nuclear Safety Analysis Center ("NSAC"). This effort by industry anticipated the observation in the Rogovin Report that "the structure of the nuclear industry has not been conducive to the effective sharing and integration of operating data." 8/

The Staff's Proposed Enforcement Policy does not recognize the value and importance of exchanging such information, other than to the extent that civil penalty assessments will focus industry attention on the violation. The Proposed Policy simply provides that a penalty will automatically be reduced by 50% if prompt reporting occurs, thereby encouraging the voluntary reporting of violations. Enforcement Policy, Enclosure 1 at Table I. But a fundamental policy objective of any Enforcement Program should be to encourage licensees to exchange experiences freely. This could be accomplished more readily if the Commission encouraged such voluntary reporting and the

7/ Rogovin Report at 97.

8/ Id. at 96.

exchange of such information, and provided that such reporting may serve to mitigate more fully the imposition of sanctions in certain instances. 9/

NUGOE submits that it is in the interest of all involved with the utilization of nuclear power reactors for licensees to exchange information freely, and that the Commission should implement an Enforcement Program which as a matter of policy encourages the free-flow of such information. The advantages of encouraging the voluntary exchange of such information are multi-faceted. Licensee inspection and evaluation teams can make valuable recommendations for improvements in plant operation, whereas NRC inspectors must confine their inspection to a determination of whether a power reactor licensee is in compliance with statutory or regulatory requirements. Moreover, since as a practical

9/ The Rogovin Report made a similar observation when it stated at pages 161-62 as follows:

The time consumed by [reporting every item regardless of whether it poses a substantial safety hazard], in addition to the prospect of a fine, may cause those who have a legal reporting obligation to conclude that identifying and dealing with safety issues, particularly those that seem relatively unimportant, is "more trouble than it is worth." In addition, these parties know that filing a report will likely cause others with whom they do business to become enmeshed in the administrative process. Thus, those in the best position to identify safety concerns may simply stop looking for them and raise them only when they feel it is absolutely necessary to do so.

matter the NRC cannot inspect all facets of every power reactor under construction or in operation, encouraging the voluntary exchange of information will broaden the scope of information available to licensees so that potential dangers are more likely to be quickly identified and resolved by the licensee's own inspections. Finally, because a licensee's evaluation and audit teams are experienced in all facets of plant construction and operation, the basic thrust of their review is geared toward both whether a licensee is in compliance with all NRC standards and whether a plant is actually being constructed and operated safely. Thus, by exchanging information with other licensees, they will be able to help cause evolution of higher performance norms which may transcend a determination of whether existing NRC standards are satisfied.

b. Encourage Voluntary Corrective Action. Directly related to the need to exchange information is the need to encourage voluntary corrective action by power reactor licensees. The Staff recognizes the importance of such action in its Proposed Policy where it proposes to mitigate civil penalties by an automatic 50% if corrective action is taken. Enforcement Policy, Enclosure 1 at Table I. However, since the Staff approach is too mechanistic, the potential of the Staff's Proposed Policy to foster the safe construction and operation of power reactors is not fully realized.

For example, corrective actions following a violation can require a licensee to spend a considerable sum of both time and money. While the cost of such actions in many instances is something over which a licensee has little or no control, the amount of the civil penalty which may be imposed as a result of the violation is within the discretion of the NRC. Therefore, when a licensee voluntarily takes expensive corrective action to remedy a situation, it is certainly consistent with the public interest for the Commission to exercise discretion by mitigating the amount of the related civil penalty accordingly.

Accordingly, NUGOE suggests that the Commission adopt the following policy when developing its Enforcement Program:

The Enforcement Program should encourage licensees to initiate and maintain programs for searching out and resolving problems, for sharing information with other licensees and licensee-support organizations, and for striving toward increasingly higher standards of safety and performance.

2. The Need For Discretion.

The Staff's Proposed Enforcement Policy apparently contemplates the use of little or no discretion in initiating enforcement actions and in subsequently imposing civil penalties and issuing suspension and revocation orders. Rather, it would mandate the prescribed enforcement action for a given violation by, in many instances, apparently compelling the use of automatic civil penalties of specified

amounts in addition to automatic suspension and revocation orders. In fact, the Staff developed such a Proposed Policy to formalize the Enforcement Program, and to establish what it perceives to be a desirable "greater uniformity in the treatment of licensees." 10/ See Enforcement Policy, Enclosure 1, at Table III. Somewhat paradoxically, however, the Staff also stated that in certain (unidentified) instances, "technical discretion of how to apply the enforcement policy is going to be needed" (Tr. at 25-26; Enforcement Policy, Enclosure 1, at 4, n. 4).

The Staff's approach is incompatible with Commissioner Hendrie's statement that monetary penalties of \$100,000 should not be assessed as a matter of course for every severity I and II violation (as prescribed in the Proposed Policy), regardless of its nature, a statement with which Chairman Ahearne agreed. Tr. at 57-58. Commissioner Hendrie's view in this regard confirms his earlier expression to Congress that the maximum penalty would be imposed "rarely, if at all." Infra, at 22-23.

NUGOE urges the NRC to state clearly in the Enforcement Program ultimately adopted that discretion will be exercised in determining whether and in what form to bring an enforcement action. We have identified two elements of such discretion which we believe should be included in the Enforcement Program. The first concerns whether, on the

10/ Transcript of March 19, 1980, Commission meeting, In the Matter of Discussion of SECY 80-139, NRC Enforcement Program ("Tr.") at 20.

basis of a given set of facts, any enforcement action should be initiated. The second concerns the extent to which a monetary penalty should be imposed for a particular violation, and whether license suspension or revocation should be ordered. These discretionary components are further elaborated upon below within the context of the most stringent enforcement mechanisms relied upon in the Staff's Proposed Policy, viz., license revocation and suspension, and monetary penalties.

a. Revocation and Suspension. Section 186(a) of the Atomic Energy Act 11/ provides that a license may be revoked for a variety of violations including, but not limited to, material false statements submitted in an application, or any subsequent report, record, or inspection which would warrant the Commission to refuse to grant a license on an original application; a failure to construct a facility in accordance with the construction permit or license; or for violation or failure to observe any of the terms or provisions of the Act or any regulation of the Commission.

NUGOE recognizes that in the case of the most serious of such violations, license suspension may be an appropriate action, particularly if there is no reasonable assurance that such a violation will not reoccur. Moreover, if a licensee's history of performance demonstrates a willful disregard for safety regulations or is replete with

11/ 42 U.S.C.A. §2236(a).

violations resulting in actual safety hazards, then even revocation of the license may be appropriate.

As noted, Section 186 provides for revocation of a license as a result of the violation of any Commission regulation. The NRC Regulation implementing this provision, 10 C.F.R. §50.100, tracks the language of Section 186 for the most part by providing for the suspension or revocation of a license for failure to observe "any of the terms and provisions of the [A]ct, regulations, license, permit, or order of the Commission." It is important to note in this regard that both Section 186 of the Act and 10 C.F.R. §50.100 provide that licenses "may be" revoked for such violations. They do not mandate that licenses "shall be" revoked each time a violation occurs. This language is significant, for by using the phrase "may be" instead of "shall be" in Section 186, Congress indicated that the Commission should exercise discretion when determining whether the drastic penalty of license revocation (or suspension) is necessary and appropriate. 12/

The logic of this Congressional intent is clear, for if no discretion is exercised by the NRC in determining whether to initiate an enforcement action and, if initiated, what action is appropriate, then a literal reading of Section 186

12/ S. Rep. No. 91-553, 91st Cong., 1st Sess., reprinted in [1969] U.S. Code Cong. Admin. News 1607, 1617. It is significant to note in this respect that the Report states the Commission is "authorized" to impose civil penalties. It does not say that the NRC is "required" to impose them. Id.

of the Act could lead to the ludicrous conclusion that license revocation could be occasioned by minor violations of NRC Regulations. In light of the foregoing, we submit that the Enforcement Program ultimately adopted by the Commission should preserve the exercise of discretion in initiating enforcement action and in formulating appropriate sanctions. 13/ Therefore, to assure that the NRC continues to exercise its discretion as a matter of policy, NUGOE urges the NRC to adopt and articulate the following guideline in developing its Enforcement Program:

Section 186 of the Atomic Energy Act gives the Commission discretion in determining whether to revoke or suspend licenses. In exercising this discretion, the Commission normally will not revoke or suspend licenses unless the continued operation of a power reactor will result in an imminent and actual danger to the public health and safety or to the common defense and security.

b. The Imposition of Civil Penalties. The authority of the NRC to impose civil monetary penalties implicates the discretion afforded the NRC under Section 186 of the Act. Section 234 of the Act currently authorizes the Commission to impose a maximum civil penalty of \$5,000 per violation, not to exceed \$25,000 within any period of 30 consecutive days. This civil penalty authority, together with Section 186 and Section 232 14/, is intended to "afford the Commission

13/ See note 15, infra, and accompanying text.

14/ 42 U.S.C.A. §2280. Section 232 authorizes the NRC, through the Attorney General, to seek a court order enjoining any unlawful act or practice.

ample flexibility to deal with infractions of varying severity." 15/

Prior to the enactment of Section 234, the NRC could have sought to remedy a less serious violation by resorting to Section 186. However, to do so would have resulted in a draconian result, i.e., suspension or revocation, which in the case of such violations would have been simply excessive. Thus, in many instances, no enforcement action was brought at all. 16/ The civil penalty authority filled this enforcement void and solved the dilemma inherent in Commission enforcement actions for less severe violations. Just as Section 186 contemplates the use of discretion, Section 234 likewise provides that the Commission "may" impose civil penalties in certain instances. It does not require the Commission to do so.

As proposed by the Staff, the Enforcement Policy apparently would impose automatic monetary penalties (up to \$100,000 per violation) for predetermined violations, subject to 50 percent automatic mitigation if the licensee voluntarily reports and corrects the violation in a timely

15/ S. Rep. No. 91-553 at 1616.

16/ As the Senate Report stated, with this civil penalty authority "the Commission could, among other things, levy a civil monetary penalty where suspension or revocation of a license is not required, without depriving a licensee of his means of livelihood or without requiring the cessation of an authorized activity which might be of material benefit to the public." Id.

manner. NRC Enforcement Policy, Enclosure 1, at 7, 9, and Tables I, II and III. The statutory basis for the increased monetary penalty authority is the pending amendment to Section 234 of the Atomic Energy Act. If enacted, it would authorize the NRC to impose civil penalties of \$100,000 per violation with no upper cumulative limit. 17/

When read in conjunction with the Commission's decision in Atlantic Research Corporation, ___ NRC ___, CLI-80-70 (March 14, 1980), the Staff's proposal would apparently impose automatic penalties as a matter of course. In Atlantic Research, the Commission held that a licensee is liable for violations of NRC regulations by an employee without regard for whether the employee knowingly violated the licensee's procedures or whether the licensee itself was culpable for the violation. Thus, whenever the facts demonstrate a violation of any applicable statute or regulation, the licensee is deemed responsible (liable) for that violation, pursuant to Atlantic Research. 18/ And, in accordance

17/ See note 29, infra, and accompanying text.

18/ We do not intend here to challenge or even address the correctness of the liability issue in Atlantic Research. However, as our discussion of the nature of fines properly imposed pursuant to Section 234 makes clear, the issue of absolute liability must be distinguished from whether, once such liability is established, a civil penalty issued pursuant to that section is appropriate. The Commission recognized this distinction in Atlantic Research when, having found liability, it remanded the matter for consideration of whether the monetary penalties there should be mitigated. Atlantic Research, slip op. at 19.

with the Proposed Enforcement Policy, a specified enforcement action, including the imposition of civil penalties in predetermined amounts, would be taken automatically. NUGOE submits that such a wooden approach to enforcement is contrary to pertinent statutory authority and to the sound exercise of administrative discretion by the NRC.

Section 234 of the Act is modelled in substantial part after the civil penalty authority conferred on other regulatory agencies. The legislative history indicates, as follows:

Substantially the same remedial authority has been conferred by statute on other regulatory agencies, such as the Federal Communications Commission, the Federal Aviation Agency, and the Federal Trade Commission, to assist them in carrying out their regulatory functions. 19/

The following review of the policies adopted by those agencies in implementing their civil penalty authorities, and of the interpretations of such authorities by the courts, reflects that the facts, circumstances and mitigating factors of each case should be considered in determining the amount of each penalty. The Staff's Proposed Enforcement Policy is not consistent with this experience and judicial guidance.

19/ S. Rep. No. 91-553 at 1616. The then AEC General Counsel expressed similar sentiments during hearings on Section 234 before the Joint Committee on Atomic Energy. "AEC Omnibus Legislation - 1969," Hearings before the Joint Committee on Atomic Energy, 91st Cong., 1st Sess. (September 12, 1969) at 29.

The Federal Communications Commission ("FCC") is authorized to impose civil fines for repeated (i.e., continuous violations lasting more than one day) 20/ or willful violations of the Federal Communications Act, FCC regulations or the terms of FCC licenses. 21/ In implementing these provisions, and in determining the amount to be assessed, the FCC considers the nature and circumstances surrounding the violation, the seriousness and the duration of the violation, the licensee's past record of compliance and the financial condition of the licensee. 22/

Similarly, the Federal Trade Commission ("FTC") has also implemented its civil enforcement authority 23/ by considering several factors in determining the appropriate penalty for each case. This policy has been long-standing, and the courts view it as essential to the enforcement scheme:

20/ S. Rep. No. 95-580, 95th Cong., 2d Sess. (1978), as reprinted in [1978] U.S. Code Cong. and Admin. News 109, 132.

21/ 47 U.S.C.A. §503(b).

22/ Williams County Broadcasting System, Inc., 53 FCC 2d 1056, 1060 (1975); Radio Beaumont, Inc., 13 FCC 2d 965, 967 (1976). When Congress increased the statutory maximum amount of FCC civil penalties, it recognized that the FCC's policy was appropriate for implementing that Commission's civil penalty authority and indicated that the penalties should not be imposed in the future without consideration of those factors. 47 U.S.C.A. §503(b)(2).

23/ 15 U.S.C.A. §45(1).

The size of the penalty [imposed for violation of an FTC cease and desist order] should be based on a number of factors including the good or bad faith of the defendants, the injury to the public, and the defendants' ability to pay. 24/ [Emphasis added.]

In addition to these factors, consideration of the defendants' due care, good faith efforts to comply, prior good business record and cooperation with the government is appropriate. 25/

Finally, Section 901(a)(1) 26/ of the Federal Aviation Act of 1958, as amended, authorizes the imposition of civil penalties for violations of that Act, or any order, rule or regulation issued thereunder. Several considerations are appropriate in determining the level of civil fines at the Federal Aviation Administration. In addition to consideration of defendants' good faith, courts have held that the

24/ U.S. v. J.B. Williams Company, Inc., 498 F.2d 414, 438 (2d Cir. 1974) (citations omitted). See also U.S. v. H.M. Prince Textiles, Inc., 262 F.Supp. 383, 388 (S.D.N.Y. 1966), citing U.S. v. Vitasafe Corp., 212 F.Supp. 397, 398 (S.D.N.Y. 1962) ("the lack of intention to violate the [FTC] order must be considered in determining the extent of civil penalties to be imposed").

25/ H.M. Prince Textiles, *supra*, 262 F.Supp. at 388-89. Congress apparently agreed that such factors should be considered in determining the amount of civil penalties. Accordingly, it amended the FTC Act in 1974 to provide that in cases brought by the FTC to recover civil penalties, the court is to take into account mitigating factors similar to those which the FTC has long considered in assessing civil penalties. See 15 U.S.C.A. §45(m)(1)(c).

26/ 49 U.S.C.A. §§1471(a)(1).

FAA should consider cooperation with the government and reasonable but erroneous interpretation of the regulations in setting the amount of the penalty, 27/ the absence of any actual injury to person or property, and "other mitigating circumstances." 28/

Since the NRC's civil penalty authority is modelled after that of the FCC, FTC, and FAA, we submit that the NRC should be guided in developing its Enforcement Program by the policies and experiences of those agencies. The Staff's Proposed Policy fails to do so in that it does not adequately provide for the exercise of discretion and the consideration of a range of mitigating circumstances.

Importantly, the amendment to Section 234 (which, if passed, will authorize the NRC to levy monetary penalties of up to \$100,000 per violation) contemplates using such authority in a flexible manner. Specifically, the Conference Report explaining the amendment to Section 234, states as follows:

The conferees expect that the Commission, in setting the amount of any penalty, will consider relevant factors such as the gravity of the violation, the financial impact of such fine on the licensee, good faith, and the history of previous violations. 29/

27/ See U.S. v. Northwest Airlines, Inc. 69 F.Supp. 482, 487 (D. Minn. 1946).

28/ See U.S. v. Newman, 331 F.Supp. 1240, 1244 (D. Hawaii 1971).

29/ H.R. Rep. No. 1070, 96th Cong., 2d Sess. (1980) reprinted in 90 Cong. Rec. H4472, 4481 (daily ed. June 4, 1980).

This language is drawn in large part from the House Report on the amendments. 30/

Moreover, the Senate Report stated that increased civil penalty authority was needed so that the Commission would have the flexibility to assess fines which were "scaled in accordance with the violator's ability to pay." 31/ This suggests that the Senate expects the Commission to examine a licensee's ability to pay on a case-by-case basis and not to impose penalties based on a perception of the financial status of all licensees in a class, such as all power reactor licensees.

Lastly, when the NRC requested increased civil penalty authority from Congress, it stated as follows:

NRC would expect that this augmented civil penalty would carry with it the responsibility to exercise judgment, discretion and restraint. The proposed increase in maximum penalties is not intended to indicate the general level of fines that would typically be imposed. Rather, this new penalty structure would give the NRC flexibility to deal appropriately with those cases that arise rarely, if at all, in a well-

30/ H.R. Rep. No. 96-194 Part 1, 96th Cong., 1st Sess. 11 (1979).

31/ S. Rep. No. 96-176, 96th Cong., 1st Sess., 23-24 (1979).

administered regulatory program backed by adequate incentives for compliance. 32/

In view of the foregoing, NUGOE suggests that the Commission adopt the following guideline when developing its Enforcement Program to assure that as a matter of policy the NRC continues to exercise its discretion when imposing civil penalties:

The NRC will, in utilizing its increased monetary penalty authority, continue to exercise its discretion in deciding whether and in what amount monetary penalties will be imposed. Moreover, in exercising this discretion, the NRC will impose the maximum penalty of \$100,000 per violation as the rare exception and not automatically as the rule. Factors to be taken into account when making this assessment include the extent to which the violation resulted in an imminent and actual danger to the public health and safety or to the common defense and security; the financial capability of the licensee; the good faith efforts of the licensee to comply with applicable statutory and/or regulatory requirements; the history of a licensee's previous significant violations, if any; the licensee's actions in identifying, reporting and correcting a violation in a timely manner and in cooperating with the Commission; and whether such penalties

32/ Hearings before the Subcommittee on Energy and Environment of the Committee on Interior and Insular Affairs on H.R. 2608, 96th Cong., 1st Sess. 487 (1979) (letter from NRC Chairman to Chairman Udall, Subcommittee on Energy and the Environment). When the Staff discussed its Proposed Policy with the Commissioners on March 19, 1980, Commissioners Hendrie and Ahearne emphasized their doubt that the \$100,000 penalty should be assessed as a matter of course. Tr. at 57-58.

are necessary if the enforcement action includes an order suspending or revoking a license.

3. Penalties Should Be Remedial.

During the March 19, 1980, meeting with the NRC Staff, Commissioner Gilinsky questioned whether the NRC had a view of the purposes for imposing sanctions when violations are discovered. In response to that inquiry, the following colloquy occurred:

MR. STELLO: My view is that the whole purpose of taking any enforcement action is to cause either the organization you are taking enforcement action against or the industry as a whole to conform to the requirements of the Commission, to pay attention to the detail that is appropriate and needed for safety.

COMMISSIONER GILINSKY: Right. But, then there was always a certain amount of uncomfortableness over the punitive aspect of the enforcement action and to what extent it is a matter of getting someone's attention to make sure they pay attention and cooperate, you might say, to what extent is it reasonable simply to hand out tickets because you have been exceeding the speed limit? [Tr. at 16-17.]

This exchange reflects the compelling need for the Commission to articulate the purposes of enforcement actions in general and the imposition of civil penalties in particular. NUGOE submits that penalties should be imposed only when they are remedial (i.e., designed to encourage the safe utilization of power reactors) and not to punish licensees for violations.

It is beyond valid dispute that Section 234 is intended to impose only civil liability. Senate Report 91-553 states at 1622 that "the penalties authorized [in that section] are civil only and are remedial in nature as opposed to punitive." Moreover, when Section 234 was adopted, Section 223 of the Act 33/ was amended to provide that "whoever willfully violates . . . any provision of this chapter for which no criminal penalty is specially provided . . . shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than two years or both" [Emphasis added.] The purpose of this amendment was to "make it absolutely clear that the penalties referred to in [Section 223] do not include civil monetary penalties imposed under . . . §234." 34/ The recent amendments to §234 do not change the nature of these penalties. 35/

The civil nature of Section 234 carries with it constitutional implications. For example, certain protections afforded to defendants in criminal cases are not present in civil cases. These protections include a right to a jury trial, 36/ the prohibition against double jeopardy, 37/ and

33/ 42 U.S.C.A. §2273.

34/ S. Rep. No. 91-553 at 1619.

35/ S. Rep. No. 96-176 at 26.

36/ Helvering v. Mitchell, 303 U.S. 391, 402 (1938).

37/ One Lot Emerald Cut Stone and One Ring v. United States, 409 U.S. 232, 235-36 (1972).

the privilege against self-incrimination. 38/ Moreover, when government brings an action for civil penalties, it can successfully recover such sanctions based merely on a "preponderance of the evidence," a much less stringent standard than that applied in criminal cases. 39/ It is for these reasons that the "[o]ne kind of power of adjudication which clearly cannot be conferred upon an administrative agency [by Congress] is the power to determine guilt or innocence in criminal cases." 40/

It is critical that the distinction between civil and criminal penalties be reflected in the Enforcement Program in order to assure that the Program is consistent with Section 234, and to avoid any potential constitutional infirmity which would render the program legally invalid. Thus, the Commission should establish as a matter of policy

38/ Ward v. Coleman, 598 F.2d 1187, 1194 (10th Cir. 1979), cert. granted, 62 L.Ed.2d 305 (1979).

39/ Compton v. United States, 377 F.2d 408, 411 (8th Cir. 1967).

40/ 1 K. Davis, Administrative Law Treatise, §2.13 at 133 (1958). Because it is much easier for administrative agencies to assess and collect civil rather than criminal fines, one commentator suggested that "civil penalties have been enacted to deny defendants the protections normally afforded in criminal prosecutions." Charney, The Need for Constitutional Protections for Defendants in Civil Cases, 59 Cornell L. Rev. 478, 483 (1974).

that civil penalties may be used only when they will have a remedial and deterrent effect. 41/

The Commission in Atlantic Research recognized that the imposition of a civil penalty must relate to "potential improvement of conduct either by the licensee or any other person." 42/ Since Section 234 requires that civil penalties be remedial in purpose, and since the Commission recognizes the need to relate such civil penalties to potential improvement of conduct, it follows that an adequate factual basis must exist to support a conclusion that the imposition of

41/ "[D]eterrence is not solely a value of criminal law, but has long played a role in civil law too." Goldschmidt, Report in Support of Recommendation 72-6, An Evaluation of the Present and Potential Use of Civil Monetary Penalties as a Sanction by the Federal Administrative Agencies, Recommendations in Report of the Administrative Conference of the United States, Vol. 2, 896, 914-15 (1970-72). Thus, penalties designated "civil" by Congress will generally be upheld if they:

- "(1) are rationally related to a regulatory . . . scheme;
- (2) do not deal with offenses which are mala in se (i.e., homicide, rape, robbery and other crimes which are traditionally and widely recognized outrages and threats to common security);
- (3) may be expected to have a prophylactic or remedial effect."

Id. at 914 (citations omitted).

42/ Atlantic Research, slip op. at 10.

civil penalties will have the requisite remedial purpose. 43/ It likewise follows that the automatic imposition of severe, predetermined monetary penalties without any factual basis for concluding that the regulatory purpose of the Act will be furthered by such action would constitute an abuse of the Commission's Section 234 authority. 44/

Moreover, in view of the remedial and deterrent effects which civil penalties must have, the NRC should assess the role of criminal penalties in developing the general statement of Commission policy. Several mechanisms are available for dealing with violations, including formal and informal civil action and criminal action. These different enforcement actions are not necessarily inconsistent, i.e., the use of

43/ Whether, in fact, there was a relationship between "improvement of conduct" and the assessment of a civil penalty in Atlantic Research caused disagreement among the Commissioners. The majority was content simply to assert that the licensee had instituted procedures designed to avoid a repeat of the incident and that the imposition of penalties "might influence other licensees in similar positions to take whatever measures necessary to assure compliance" Id. at 12. We express no view at this time on whether the record in Atlantic Research is adequate to support a finding that the penalty proposed in that case would improve the conduct of either the licensee against whom the penalty was assessed or against other licensees.

44/ See Beck v. Securities & Exchange Commission, 430 F.2d 673 (6th Cir. 1970) (Rejecting SEC contention that stockbroker must be suspended in order to deter him from future misconduct and to discourage misconduct by others in the industry since record disclosed no reason to believe the stockbroker was inclined to commit any further illegal or fraudulent acts.)

one may not bar another. For example, some rare violations may lead to criminal action in addition to civil action. 45/

The NRC Enforcement Policy should address the overall influence of all available legal sanctions, which are or may be imposed for violations. Evaluation of this cumulative influence is necessary if due account is to be taken of the deterrent effect which the use of criminal penalties will have. In fact, the use of criminal penalties may have a much stronger deterrent effect than will the use of civil penalties. Thus, only by assessing the cumulative impact of both civil and criminal penalties will the Commission be aware fully of the impact of its Enforcement Program. Accordingly, NUGOE recommends that to assure a policy which allows for the imposition of remedial sanctions the NRC adopt the following guideline when developing its Enforcement Program:

The imposition of enforcement sanctions should be for remedial purposes only, i.e., to foster the safe utilization of nuclear power reactors. Accordingly, such sanctions should be imposed only when the Commission has a factual basis for concluding that they will further such remedial purposes (such as the improvement of licensee conduct). When making this assessment, the influence of all legal sanctions (civil and criminal) should be taken into account.

As a necessary corollary to the conclusion that civil penalties must be imposed only on a remedial basis, NUGOE submits that such penalties should be no more stringent

45/ See, e.g., S. Rep. No. 91-553 at 1616.

than necessary to deter future similar violations. For example, it serves no practical purpose to impose huge monetary penalties on the licensee of a plant at which a violation has occurred which will require the licensee to incur substantial expenses. The Staff has estimated that the Three Mile Island accident would have triggered a civil penalty under its Proposed Policy of \$127 million (Tr. at 49). However, the magnitude of accident-related costs alone assures industry's upmost attention to the safe utilization of nuclear power reactors. Imposing huge NRC penalties could thus add no incentive to avoid future accidents by NRC licensees.

Accordingly, NUGOE suggests that the Commission adopt the following policy when developing its Enforcement Program:

Enforcement action should be remedial and only as stringent as is necessary to deter future similar violations. It should not simply punish licensees who violate statutory or regulatory requirements.

4. Employment of the Most Capable Staff.

Regardless of the NRC's authority to impose sanctions and regardless how vigorously that authority is exercised, the primary responsibility for the safe construction and operation of power reactors rests on the licensee and its personnel who actually construct, maintain and operate the facilities. The Kemeny Commission recognized the vital role of such personnel when it stated that "it is important to

attract highly qualified candidates for the positions of Senior Operator or Operator Supervisor" and that "[p]ay scales should be high enough to attract such candidates." 46/ Implicit in this observation is that without competent, experienced personnel, the safe operation of power reactors would be more difficult.

The Staff's Proposed Enforcement Policy fails to account for such considerations. If penalties for violations become increasingly severe and are assessed automatically and without regard to mitigating factors, individual errors may result in employee disciplinary action, even if such errors do not pose an actual danger to public health and safety. Cognizant of this threat, personnel may become more reluctant to report violations to their supervisors. Moreover, the constant fear of such harsh consequences may very well result in competent staff seeking a less pressure-filled atmosphere, and may cause difficulty in replacing such staff with equally competent personnel. Thus, NUGOE submits that the Enforcement Program should encourage employment on a long-term basis of the most capable staff to construct and operate nuclear power reactors, and that the Commission should adopt the following policy when developing its Enforcement Program:

The Enforcement Program should contribute to an environment in which a licensee is able to attract and retain the most capable personnel.

46/ Kemeny Commission at 69.

5. Commission Involvement In Stringent Enforcement Actions.

The Rogovin Report states that "[o]ne Commissioner characterized relations between the staff and the Commission as not unlike those between sovereign countries: cordial, distant, and conducted for the most part in writing, but always with the requisite formalities." 47/ It also found that "[a]s a practical matter, most of the functions of the NRC, including licensing . . . and inspection . . . are carried out by the NRC staff. Obviously, one of the Commission's functions is to manage and set policy for its staff. But in practice the Commission has isolated itself from the NRC staff." 48/

We believe that because stringent enforcement actions, including issuance of revocation and suspension orders, involve such issues of public policy as the need for electricity, the distance between the Commission and Staff must be narrowed. The Staff recognizes this need for direct Commission involvement, for when the Staff submitted the Proposed Enforcement Policy to the Commissioners, it stated as follows:

[T]here are some broader issues that are raised in terms of what other considerations might be that are addressed in the memorandum from Mr. Dircks to the terms of

47/ Rogovin Report at 112.

48/ Id.

need for power and other questions which, in my view, are matters of discretion that the Commission has and the policy of the office has been whenever these issues arise and we are taking enforcement action, that we do inform the Commission. We come down to the Commission and let them know what we are doing and if there is ever an instance where a particular action would need to take into account something such as the need for power, in my view, that is a matter that the Commission would decide rather than me personally. [Tr. at 26-27.]

The Staff further stated specifically that in issuing large civil penalties it "would come to the Commission and let the Commission know that we are going to be issuing civil penalties in that amount and explain why, just as we do now." Tr. at 47.

In light of these considerations, NUGOE suggests that the Commission adopt the following guideline when developing its Enforcement Program:

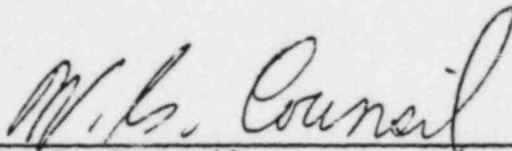
The Enforcement Program should assure direct Commission involvement and decisionmaking when stringent enforcement actions are taken.

IV. CONCLUSION

NUGOE has submitted this statement to the Commissioners and Staff as part of its efforts to aid in the development of the NRC Enforcement Program. It has identified our perception of the goal of the NRC Enforcement Program and the policies upon which that Program must rest.

As indicated in the April 25 letter to Chairman Ahearne, the Group intends to complete its proposed Alternative Enforcement Program and its memorandum critiquing the Staff's Proposed Program by July, 1980. These will then be submitted to the Commission. We reiterate that this statement, while touching in part on difficulties we perceive in the Staff proposal, does not constitute the critique of that proposal. After our alternative Enforcement Program and critique are submitted to you, we would appreciate the opportunity for management to meet with the Commissioners to discuss, as representatives of NUGOE, the Commission's efforts to develop a new NRC Enforcement Policy and industry's input on that effort.

Respectfully submitted,


W. G. Council
Chairman
Nuclear Utility Group
On Enforcement

June 6, 1980