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POLICY ISSUE

(Notation Vote)

October 22, 1996

SECY-96-222

For: The Commissioners

From: James M. Taylor
Executive Director for Operations

Subject: USE OF OPEN PREDECISIONAL ENFORCEMENT CONFERENCES AND
ELIMINATION OF CERTAIN PROVISIONS FOR COMMISSION
CONSULTATION; PROPOSED REVISIONS TO THE ENFORCEMENT
POLICY TO ADDRESS RISK SIGNIFICANT VIOLATIONS AND
CERTAIN NON-CITED VIOLATIONS

Purpose:

To respond to the June 16, 1995 SRM and obtain Commission approval to revise the NRC Enforcement Policy regarding the issues of open predecisional enforcement conferences and consultation with the Commission. The staff is also seeking Commission approval to revise the Enforcement Policy to explicitly address treatment of risk significant violations and clarify use of Non-Cited Severity Level IV violations.

Background:

In SECY-95-084, dated April 6, 1995, the staff forwarded to the Commission the report of the review team which addressed the NRC enforcement program, NUREG-1525, "Assessment of the NRC Enforcement Program." This paper sought Commission approval for 19 recommendations that required Commission action. By SRM dated June 16, 1995, the Commission approved the majority of the recommendations and Enforcement Policy revisions. However, the Commission did not approve recommendations regarding the use of open predecisional enforcement conferences and elimination of certain provisions for Commission consultation. Instead, the Commission requested that the staff return to the Commission with recommendations for these issues after one year of experience under the new Enforcement Policy, that became effective June 30, 1995.

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IDA-R-3-1 VIOLATIONS

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12/17/96

Predecisional Enforcement Conferences: The review team's recommendations concerning open predecisional enforcement conferences were:

- II.C-4 That the Enforcement Policy be modified to state that predecisional enforcement conferences will normally be open to public observation, but not to public participation. The Enforcement Policy should also state under what circumstances predecisional enforcement conferences will not be open to the public (i.e., when involving privacy, safeguards, proprietary, and investigational issues).
- II.C-5 That the Enforcement Policy be modified to include the following purpose statement for conducting open enforcement conferences:
- The purpose of conducting predecisional enforcement conferences in the open is not to maximize public attendance, but rather to provide the public with opportunities to be informed of NRC activities while balancing the need for the NRC staff to exercise its regulatory and safety responsibilities without undue administrative burden.
- II.C-6 That open enforcement conferences be announced using existing notification mechanisms. The practice of issuing press releases for open conferences should be discontinued.

These recommendations are discussed in NUREG-1525 at pages II.C.-7 - II.C.-21 which are reproduced in Attachment 1.

Commission Consultation: The recommendation concerning Commission consultation was:

- II.G-1 That the Enforcement Policy be revised to require prior consultation with the Commission for:
- (1) An action affecting a licensee's operation that requires balancing the public health and safety or common defense and security implications of not operating with the potential radiological or other hazards associated with continued operation;
 - (2) Proposals to impose civil penalties for a single violation or problem in amounts greater than 3 times the Severity Level I values shown in Table 1A;
 - (3) Any proposed enforcement action that involves a Severity Level I violation;
 - (4) Any proposed enforcement case involving an Office of Investigations (OI) report where the staff (other than

the OI staff) does not arrive at the same conclusions as those in the OI report concerning issues of intent, if the Director of OI concludes that Commission consultation is warranted;

- (5) Any action the EDO believes warrants Commission involvement; and
- (6) Any proposed enforcement action on which the Commission asks to be consulted.

This recommendation is discussed on pages II.G-4 through II.G-7 of NUREG-1525 which are reproduced in Attachment 2.

Risk-significant Violations:

As a result of discussions at the June 1996 Senior Management Meeting, the staff believes that the Enforcement Policy should be clarified to explicitly address consideration of risk in the enforcement process.

Non-Cited Violations:

As a result of experience in administering the enforcement program, the staff has identified an issue concerning application of the Enforcement Policy to Non-Cited violations involving self-disclosing events. As a result a clarification of the Enforcement Policy is recommended.

Discussion:

1. Open Enforcement Conferences

Historically, the Enforcement Policy has provided that enforcement conferences are closed meetings between the NRC and licensees to exchange information on potential safety issues. (Section V of the current Enforcement Policy states that conferences, "are not normally open to the public observation.") However, on July 10, 1992, the Commission established a 2-year trial program to determine whether the Policy should be changed to make most enforcement conferences open to attendance by the public. On July 19, 1994, the Commission announced that the trial program would be continued until the Commission had acted on the enforcement review team's recommendations.

The announcement of the trial program explained that the Commission's decision on whether to establish a permanent policy for making enforcement conferences open would be based on an assessment of the following criteria: (1) whether the fact that the conference was open impacted the NRC's ability to conduct a meaningful conference and/or

implement the NRC's enforcement program; (2) whether the open conference impacted the licensee's participation in the conference; (3) whether the NRC expended a significant amount of resources in making the conference public; and (4) the extent of public interest in opening the enforcement conference.

Under the trial program, approximately 25% of all eligible enforcement conferences were open to public observation. Open enforcement conferences were conducted in each regional office and conducted with various types of licensees. As of June 30, 1996, 113 conferences have been open since the implementation of the trial program (July 10, 1992); twenty-one of these open conferences were conducted under the new Enforcement Policy. Members of the public attended 40 of the 113 open conferences. In most cases, three or fewer members of the public attended. During the last 12 months, only 3 out of 20 open conferences had public attendance. Attachment 3 includes statistics on predecisional enforcement conferences.

Since the trial program began, the staff has been monitoring comments from licensees and members of the public. The discussion in NUREG-1525 provides a summary of the different views on the impact of opening conferences obtained through February 28, 1995. Since that time, the staff has not received any substantially different comments.

The most significant concern in allowing public observation at enforcement conferences is that open conferences could inhibit open and candid discussions between the NRC and licensees, limit the free exchange of information, and thereby reduce conference effectiveness and negatively impact the effectiveness of the enforcement program. Before the trial program was implemented, this concern was shared by the regulated industry as well as by many NRC staff and managers.

Although industry continued to reiterate this concern during the trial program, the staff does not find that open enforcement conferences conducted during the trial program were substantially less frank and open, nor was the NRC prevented from obtaining the information required to implement its enforcement program. In some cases, the staff did need to ask licensees additional questions, but the information ultimately provided was always sufficient to meet predecisional enforcement conference goals.

The staff considered licensee concerns regarding the added expense of preparing for open conferences. The need for added preparation is a decision licensees must make for themselves. It may result in a better presentation. In that regard, the staff may make an added effort to prepare for an open conference which in the staff's view contributes to the quality of the conference. In any event, licensees should keep in mind that the NRC is the audience to whom they must convey complete and accurate information.

The NRC must balance providing public opportunities for observation of

the regulatory process against the need to exercise its regulatory and safety responsibilities without undue administrative burden. Although some additional resources were spent initially, the long-term resource impact of the trial program was nominal.

Although open conferences were not widely attended during the trial program, the staff believes that opening conferences is consistent with the agency's principles of good regulation and normal agency policy ("Staff Meetings Open to the Public; Final Policy Statement," 59 FR 48340, September 20, 1994). The intent of open conferences was not to maximize public attendance, but to provide the public with an opportunity to observe the regulatory process. While having technical meetings open to the public exposes participants to the risk that information may be misunderstood or misconstrued, the staff does not find that risk to be of sufficient concern to outweigh the public confidence gained by allowing open observation of NRC predecisional enforcement conferences.

Two utilities have recently declined to attend open predecisional enforcement conferences related to issues of discrimination. In these cases, information concerning corrective action was requested in writing under 10 CFR 50.54(f).¹ It should be recognized that licensees are not required to attend predecisional enforcement conferences. If the NRC desires a conference and the licensee does not attend, the staff loses an opportunity to have a dialogue with licensee senior management concerning the root causes of the violations, safety and regulatory significance, and corrective action. If licensees begin to decline attending conferences, the staff intends to consider a rulemaking to require licensee attendance at conferences when the staff believes it is necessary to have a dialogue with the licensee as to the violations and corrective action.

After considering the impact on the NRC's ability to exercise its regulatory and safety responsibilities, the impact on the candor and openness of communications during enforcement conferences, the impact on NRC resources, and the benefit to the public, the staff recommends that the Enforcement Policy be modified to provide that most conferences be open to public observation. While, as for any public meeting, the NRC retains the discretion to close the conference for a specific case, the staff believes that, with two additions, the criteria for closing conferences currently addressed in Section V of the Enforcement Policy are normally sufficient. The trial program provides that conferences are normally closed if the case is based on an OI report. However, the staff believes that if the report has been released to the public, the conference should be open. The second change would permit the EDO to approve opening or closing a conference based on balancing the benefit

¹ It should be noted that in SECY-96-199, Plan to Better Focus Resources on High Priority OI Discrimination Cases, the staff is proposing that it not routinely hold open enforcement conferences based on DOL cases.

of the public observation against the potential impact on the agency's decision-making process in the particular case.

The staff also recommends that the Enforcement Policy continue to be clear that conferences are open for public observation and not participation.² This is consistent with the agency's policy on open meetings as reflected in Management Directive 3.5.

In SECY 95-084, the staff opposed issuance of press releases for open predecisional conferences for the reasons given in NUREG-1525. In the past year, as directed by the June 16, 1995 SRM, press releases have been issued for open conferences. The releases have been brief, announcing the public conference and carefully worded to ensure that they do not prejudice the outcome and become a penalty in themselves. Given the experience over the past year and the continued emphasis of the agency in the area of openness, the staff no longer objects to the use of brief press releases to announce open conferences. The staff recommends that the Office of Public Affairs exercise discretion and issue press releases based on whether it believes open predecisional conferences are of sufficient interest to the public. The staff recommends that any press releases continue to be carefully worded as directed by the June 1995 SRM to emphasize the predecisional nature of the meeting and note that the apparent violations being discussed are subject to review and may change prior to any resulting enforcement action. The staff notes that the Office of Enforcement also announces all predecisional enforcement conferences on the NRC external World Wide Web pages.

2. *Commission Consultation*

Most enforcement decisions are made at the staff level; however, based on guidance given in Section III of the Enforcement Policy, "Responsibilities," certain situations require formal Commission consultation. The practice of Commission consultation has existed since the Enforcement Policy was first published as an interim Policy in 1980. Since then, the number of criteria requiring this consultation has more than doubled.

For the reasons given in section II.G.3 of NUREG-1525, the staff believes that there is less need now for mandatory Commission involvement. Most of the criteria for consultation were adopted many years ago to address particular Commissioner concerns or areas where the staff had little experience. Since then, the staff has had substantial experience in implementing the objectives of the Enforcement Policy, and

² Note, however, the staff's recommendation in SECY-96-199 at footnote 36, that all others be permitted to participate in certain conferences. Based on the Commission's decision on that paper, appropriate changes will need to be made to Attachment 4, the Enforcement Policy.

it is relatively rare that the Commission changes the recommended staff approach. Senior NRC management is sensitive to issues of Commission concern. The Office of Enforcement is positioned to closely coordinate enforcement action reviews with senior regional and program office management, as well as with the EDO and DEDOs, when necessary.

Based on these factors, and considering the significant effort currently expended in providing Commission consultation on enforcement matters, the staff recommends that the staff be given more flexibility to decide what enforcement issues should be brought to the Commission's attention because of policy significance, controversy, or known Commission interest.

As stated earlier, Section III of the Enforcement Policy currently requires Commission consultation prior to taking action in ten specific situations (unless the urgency of the situation dictates immediate action). These situations, with the staff's recommended changes, are discussed below:

- (1) Description: "An action affecting a licensee's operation that requires balancing the public health and safety or common defense and security implications of not operating with the potential radiological or other hazards associated with continued operation;"

Recommendation: This provision has existed since 1980 and the staff believes that it should be maintained, based on scope and significance.

- (2) Description: "Proposals to impose civil penalties (CPs) in amounts greater than 3 times the Severity Level I values shown in Table 1A;"

Recommendation: The basic requirement to consult with the Commission before issuing CPs above certain amounts has existed since 1980 and has been modified several times. The staff agrees with the importance of consulting with the Commission in these cases, but would clarify the existing provision to indicate that the CPs in question are those issued for a single violation or problem.

- (3) Description: "Any proposed enforcement action that involves a Severity Level I violation;"

Recommendation: This provision was first introduced in the 1984 Policy revision. Because these cases involve the most significant level of violations and occur on an infrequent basis, the staff believes it is appropriate to continue to consult with the Commission before their issuance.

- (4) Description: "Any enforcement action that involves a finding of a material false statement;"

Recommendation: This provision was first introduced in the 1984 Policy revision. The description of a communication failure as a material false statement is reserved for egregious violations and is made on a case-by-case basis. Because of the egregious nature of these cases, it is logical that they would be considered very significant regulatory concerns and likely categorized at SL I.³ Because the staff is already required to consult with the Commission on cases involving SL I violations, the staff believes that it is not necessary to include this specific provision.

- (5) Description: "Exercising discretion for matters meeting the criteria of Section VII.A.1 for Commission consultation;"

Recommendation: This provision was first introduced in the 1992 Policy revision. Section VII.A.1 provides added flexibility in the CP assessment process, and requires Commission consultation if the difference between the amount of the CP proposed under this discretion and the amount of the CP assessed under the normal process is more than two times the base CP value given in Table 1A or 1B. Given the staff's experience in implementing the Commission's enforcement program objectives--including the exercise of discretion--the staff believes that each case should be judged on its own merits to determine whether Commission consultation is warranted, rather than routinely requiring it. Item 2 above provides a measure of Commission control and the issuance of Enforcement Notifications (EN) informs the Commission in advance of issuance of civil penalties providing an opportunity for the Commission to seek a further explanation or a paper from the staff.

- (6) Description: "Refraining from taking enforcement action for matters meeting the criteria of Section VII.B.3;"

Recommendation: This provision was first introduced in the 1987 Policy revision. Section VII.B.3 addresses violations identified during extended shutdowns or work stoppages. Given the staff's experience in implementing the Commission's enforcement program objectives, including the exercise of discretion, the staff believes that each case should be judged on its own merits to

³ The Statements of Consideration for the completeness and accuracy rule, e.g., 10 CFR 30.9, 40.9, 50.9, etc., (52 FR 49362, December 31, 1987), explained that with adoption of the rule the Commission will have a mechanism to be used in most cases to provide a range of enforcement sanctions for the various severity levels of violations. However, the term "material false statement" was retained as an added enforcement tool for use in egregious cases involving intent.

determine whether Commission consultation is warranted, rather than routinely requiring it. The staff would issue an EN for the first time that discretion is exercised for a plant in the shutdown condition. Therefore, the staff believes this provision is not necessary.

- (7) Description: "Any proposed enforcement action that involves the issuance of a civil penalty or order to an unlicensed individual or a civil penalty to a licensed reactor operator;"

Recommendation: This provision was first introduced in the 1991 Policy revision. The staff believes this criterion should be deleted. Given the staff's experience in implementing the Commission's enforcement program objectives on issuing orders to individuals, the staff believes that each case should be judged on its own merits to determine whether Commission consultation is warranted, rather than routinely requiring it. EN's would be issued for these cases. The staff also observes that, under the current Policy, civil penalties are not normally issued to unlicensed individuals or operators, and the staff intends to consult with the Commission on such cases under Criterion 8, below. Therefore, the staff believes this provision is not necessary.

- (8) Description: "Any action the EDO believes warrants Commission involvement;"

Recommendation: The staff believes it is appropriate to maintain this provision.

- (9) Description: "Any proposed enforcement case involving an Office of Investigations (OI) report where NRC staff (other than OI staff) does not arrive at the same conclusions as those in the OI report concerning issues of intent if the Director of OI concludes that Commission consultation is warranted;"

Recommendation: This basic provision was first introduced in the 1992 Policy revision and recently modified in a 1994 revision. The staff believes that it is appropriate to maintain this provision.

- (10) Description: "Any proposed enforcement action on which the Commission asks to be consulted."

Recommendation: This provision has existed since 1980, and the staff believes it should be maintained.

In addition to these changes to Section III of the Policy, the staff notes that the Enforcement Policy currently requires that the Commission

be provided advance notification of: (1) all enforcement actions involving CPs or orders; and (2) those cases where discretion is exercised as discussed in Section VII.B.6 of the Policy (i.e., reducing or refraining from issuing a CP or a Notice of Violation (NOV) for an SL II or III violation where the staff concludes that application of the normal guidance in the Policy is unwarranted).⁴ The staff believes that it is appropriate to continue to notify the Commission of actions involving CPs and orders by way of the EN process. Given the experience the staff has had in implementing the objectives of the Commission's enforcement program and exercising discretion, the staff recommends that the mandatory notification provisions be removed for exercises of discretion. Notification would be provided in those cases for which it is appropriate considering the uniqueness or significance of the case.⁵

The Enforcement Policy is silent concerning notifying the Commission as to issuance of NOV's (without CPs) to individuals. However, the Statements of Consideration for the Deliberate Misconduct Rule (56 FR 40664, August 15, 1991) stated that prior notice will be given to the Commission for NOV's without CPs issued to individuals. In light of staff experience in these matters, and the fact that other NOV's without CP do not require ENs, the staff recommends that this practice be eliminated.⁶

3. *Risk-significant Violations*

In evaluating violations for enforcement, the staff believes, as a general rule, the greater the safety risk from a violation, the greater should be the severity level and sanction. However, the converse is not necessarily true; low risk should not necessarily result in no sanction or a minor violation being cited. This is because many violations, although having low risk significance, may indicate a broader problem, often indicative of a programmatic licensee failure to comply with NRC requirements and, therefore, have a high regulatory significance.

The Enforcement Policy currently does not address risk explicitly,

⁴ In SECY-88-226 proposing this provision, the staff committed to giving the Commission five-day advance notice rather than the normal three-day notice for an EN.

⁵ The staff notes that the annual Office of Enforcement report provides the Commission with information as to significant enforcement actions, including exercises of discretion and actions involving individuals.

⁶ Staff practice in this regard has been inconsistent, in that in some instances ENs have been issued, but as they are not required by either the Enforcement Policy or the Enforcement Manual, they have not been issued in every case.

except in Section VII.A.1.e, which addresses the escalation of enforcement sanctions in situations when the excessive duration of a problem has resulted in a substantial increase in risk. While there is inherent discretion in the Enforcement Policy to increase Severity Levels and sanctions based on risk, the Policy should be modified to explicitly state that violations involving high risk matters should increase either the Severity Level or the civil penalty, or both.

In analyzing risk, the staff recognizes the uncertainties associated with risk assessment. Generally, qualitative rather than quantitative risk assessments are made given the number of variables associated with risk assessment. Risk should be a consideration in proposing enforcement actions, but not necessarily determinative. In developing higher civil penalties, the staff intends to consider, where appropriate, assessing separate civil penalties for each violation that is aggregated into a Severity Level II problem.

Therefore, the staff proposes that:

- (1) The following be added to the first paragraph of Section IV. Severity of Violations:

In considering the significance of a violation, the staff considers the technical significance, i.e., actual and potential consequences, and the regulatory significance. In evaluating the technical significance, risk is an appropriate consideration.

- (2) Section VII.A.1.e be modified to state:

(e) Situations where the violation has resulted in a substantial increase in risk, including cases in which the duration of the violation has contributed to the substantial increase.

These changes should provide the staff with sufficient discretion to be able to appropriately consider risk in enforcement decisions.

The staff notes that in developing sanctions for escalated enforcement actions it generally considers risk as part of the enforcement process for power reactors, relying on the use of engineering judgement based on traditional deterministic evaluation of events. To further enhance this consideration, the staff intends to take advantage of: (1) the licensee's IPE analyses⁷, (2) insights drawn from the agency's PRA expertise, and (3) the results of the Weekly Generic Issues and Events

⁷As appropriate, the Office of Nuclear Regulatory Research's Probabilistic Risk Analysis Branch will be consulted to gain its insights regarding IPE analyses.

Assessment Panel reviews⁸. The goal of staff is that violations involving high risk issues receive the appropriate enforcement actions.

4. *Non-Cited Violations (NCVs)*

In discussing the exercise of discretion, the Enforcement Policy provides examples of when discretion generally should be considered for departing from the normal approach under the Policy. Section VII.B.1 addresses Non-Cited Violations which are used to describe the existence of a violation in an inspection report but where a formal violation under 10 CFR 2.201 is not made to provide an incentive to licensees to identify and correct violations. Example 1.a. is a Severity Level IV violation that was "identified by the licensee, including identification through an event."

The staff normally uses discretion in the form of a Non-Cited Violation where the licensee identifies and corrects a non-recurring violation. However, use of this provision requires the exercise of judgment. For example, the staff does not normally use it for violations that fit an example of a Severity Level IV violation as described in the Supplements to the Enforcement Policy.⁹ Such cases normally are the more significant Severity Level IV violations. In addition, the staff has considered whether this exercise of discretion should normally be used in cases involving violations identified through an event. If the root cause of the event is obvious or the licensee had prior opportunity to identify the problem but failed to take action that would have prevented the event, the licensee has not performed in a manner that would warrant the NRC's exercising discretion not to cite the violation. On the other hand, there may be cases where, notwithstanding a self-disclosing violation, the licensee demonstrated initiative in identifying the violation's root cause. In such a case, an NCV may be appropriate.

In general, when a violation is identified by a licensee as a result of an event, discretion should only be considered when the licensee has demonstrated initiative in identifying the root cause of the violation. However, the staff believes the violation should be cited if the violation caused the event, and either the cause is obvious or a clear

⁸The Generic Issues and Events Assessments Panel meeting is chaired by the Events Assessment and Generic Communications Branch of NRR. The purpose of the meeting is to brief the staff on those events that indicate increased regulatory or safety significance. Prior to the meeting, the Branch systematically assesses and screens power reactor events to determine their significance and need for additional evaluation. Typically attendees at this collegial meeting include NRR Technical and Projects Branches, the Reliability and Risk Assessment Branch of AEOD, and members of the staff of the Office of Enforcement. As a rule, initial PRA assessments of the events are available at this meeting, and from an enforcement perspective, these meetings serve to help identify cases of potential high risk significance.

⁹Section IV of the Enforcement Policy notes that these examples are guidance but they are neither exhaustive nor controlling. Each case must be determined on its own merits.

opportunity existed to identify the violation and take action to prevent the event. The staff has developed guidance to assist in making these determinations in the Enforcement Manual and believes that the Enforcement Policy should be clarified by deleting the reference to identification through an event in the example in Section VII.B.1.(a) to make it clear that use of discretion is not automatic if the violation is identified through a self-disclosing event.

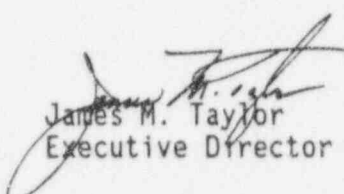
Coordination:

The Office of the General Counsel has no legal objections to this paper.

Recommendation:

That the Commission:

1. Approve these revisions to the Enforcement Policy and publication of the associated *Federal Register* notice (Attachment 4).
2. Note: That under the Small Business Regulatory Enforcement Fairness Act of 1996, the policy revision is being coordinated with OMB for its determination that this policy revision is not a major rulemaking and a copy provided to the Congress and GAO at the time of publication in the *Federal Register*.


James M. Taylor
Executive Director for Operations

Attachments: As stated

Commissioners' comments or consent should be provided directly to SECY by c.o.b. Tuesday, November 5, 1996. Commission staff office comments, if any, should be submitted to the Commissioners NLT October 29, 1996, with an information copy to SECY. If the paper is of such a nature that it requires additional review and comment, the Commissioners and the Secretariat should be apprised of when comments may be expected.

Distribution:

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NUREG-1525 II.C: Enforcement Conferences

2. Open Enforcement Conferences

Section V of the current Enforcement Policy states that, "enforcement conferences will not normally be open to the public." However, on July 10, 1992, the Commission established a 2-year trial program to determine whether the Policy should be changed to make most enforcement conferences open to attendance by the public. On July 19, 1994, the Commission announced that the trial program would be continued until the Commission had acted on the Enforcement Review Team's recommendations.

Appendix F includes a copy of the original *Federal Register* notice announcing the trial program. The policy statement explained that the Commission's decision on whether to establish a permanent policy for making enforcement conferences open would be based on an assessment of the following criteria: (1) whether the fact that the conference was open impacted the NRC's ability to conduct a meaningful conference and/or implement the NRC's enforcement program; (2) whether the open conference impacted the licensee's participation in the conference; (3) whether the NRC expended a significant amount of resources in making the conference public; and (4) the extent of public interest in opening the enforcement conference.

Under the trial program, approximately 25% of all eligible enforcement conferences were open to public observation. Open enforcement conferences were conducted in each regional office, and were conducted with various types of licensees. Eighty-seven conferences were open during this period. Members of the public attended 43% of these open conferences. In most cases, three or fewer members of the public attended. Appendix F includes statistics on enforcement conferences.

a. Summary of Comments

This section summarizes comments solicited from (1) the open enforcement conference trial program, (2) this enforcement program assessment, and (3) staff surveys conducted during the trial program.

(1) Summary of Comments From the Trial Program

The NRC first solicited comments on the issue of conducting open enforcement conferences when it originally announced the trial program on July 10, 1992. The *Federal Register* notice stated that comments could be submitted on or before the completion of the program, and the policy statement noted that persons attending open conferences would be provided an opportunity to submit written comments anonymously. The NRC received about 20 responses on the trial program, including comments from licensees, State and local governments, members of the media, members of interested citizen groups, and members of the public.

Because the NRC did not solicit comments on specific

questions regarding the trial program (such as whether the program should be made a permanent policy), comments covered a range of issues. Several commenters addressed issues related to the four criteria identified in the trial program policy statement, while other commenters addressed issues such as open conference selection criteria, notification, location, and opportunities for public education and input.

Some commenters believed that more senior-level NRC managers attended open conferences regardless of the severity level of the apparent violations, and questioned whether this was an efficient use of NRC resources. These commenters were also concerned that public attendance makes the NRC feel compelled to be a "tough regulator," regardless of the significance of the issues, and that the NRC staff may be less forthcoming or direct in its views because of the presence of observers.

Several licensees commented that they believed the information they had conveyed in open enforcement conferences was of the same quality and quantity as if the conferences were closed, while others commented that open conferences may inhibit a frank and candid exchange of information and may reduce a licensee's willingness to verbally admit violations or commit to corrective actions.

Many licensees commented that open conferences (and particularly the associated presentations) have taken significantly more time and effort, consuming resources better applied to safety issues. Licensees commented that they are motivated to take additional actions because of the concern that the media will provide an inaccurate or unbalanced view of the discussions and issues at open enforcement conferences. Several commenters observed that the NRC seems to have spent additional time preparing for these conferences for much the same reasons. In some instances, commenters reported that more NRC personnel attended open conferences than had attended closed conferences.

Many commenters noted that public attendance at open enforcement conferences has been negligible. Some stated that the relatively slight public interest in attending these conferences reinforces a conclusion that the public is adequately served by communicating enforcement actions and their basis through other NRC channels currently in place. Other commenters stated that despite low attendance, open enforcement conferences provide the public an opportunity to hear firsthand the background, associated dialogue, root causes, and corrective actions, and licensee and NRC positions on important issues.

One commenter stated that the criteria for having a closed enforcement conference should be expanded to include

situations in which the licensee determines that a particularly knowledgeable individual should attend the conference. The comment was based on the concern that an individual may not be accustomed to the stressful conditions of public speaking and that it may not be fair to hold such an individual under public scrutiny. Consequently, the commenter stated that a licensee should be allowed to participate in the decision of whether a conference is to be open or closed. Another commenter stated that, because of the potential for public confusion or premature conclusions in certain cases, the NRC should revise its selection criteria to only consider routine enforcement matters as appropriate subjects for open conferences.

One commenter found the NRC's current methods of providing notice on open conferences to be inadequate, and stated that the NRC should consider direct mailing of upcoming conferences to interested citizens (based on pre-registration). Several commenters recommended providing more advanced notice of open enforcement conferences. Two commenters attending the same conference noted that the associated press release included incorrect information.

Several commenters addressed the issue of where open enforcement conferences should be conducted. One commenter stated that the NRC should maintain its practice of holding conferences in the regional offices. The commenter stated that the minimal interest evidenced doesn't justify the added expense for the NRC to conduct local conferences, and that it would be a poor use of license fee dollars. On the other hand, many commenters supported having the NRC hold open enforcement conferences in the vicinity of the licensee.

One commenter suggested several ways to educate the public and the media, to overcome the inherent potential that licensees (and individual licensee representatives) will be prejudged as guilty simply because the conference is being held. The commenter suggested that the NRC educate attendees at open enforcement conferences in terms of the meaning and purposes of open conferences, and remind attendees that the "apparent violations" being discussed are subject to review and may change prior to any resulting enforcement action. The commenter further suggested that the NRC subsequently mail the attendees a summary of the conclusions and their bases in the event the NRC issues an enforcement action that varies significantly from the issues discussed at an open enforcement conference. Several commenters suggested that the NRC allow observers to provide input at the end of open enforcement conferences.

Comments were mixed on whether open enforcement conferences should be adopted as a permanent policy. Some commenters supported making all conferences open, based on the public

benefit and the view that open enforcement conferences are more likely to produce positive results because licensees are more likely to maintain compliance when they are subject to public scrutiny. Other commenters did not favor making all enforcement conferences open, based on concerns that open conferences would or could inhibit a frank and candid exchange of information, and that the lack of public interest does not justify the added expenditure of NRC and licensee resources. One commenter suggested that if the NRC would like to maintain some openness in the process, it should at most hold only a small fraction of all conferences as open conferences.

(2) *Summary of Comments From This Enforcement Assessment*

Section C.7 of the August 1994 *Federal Register* notice solicited views on open enforcement conferences, including whether they affected either the NRC's conduct or licensees' participation during the conferences, whether they impacted the licensees' costs, whether the public benefited from them, whether they should be transcribed, whether the NRC (or the public) should be able to participate in them by telephone, and, ultimately, whether open conferences should be made a permanent policy.

The overwhelming majority of commenters stated that open enforcement conferences have either affected or have the potential to affect the NRC's conduct or licensees' participation during the conferences. Although none cited specific examples to support their remarks, commenters stated that open enforcement conferences limited frank and open discussions, that NRC questions were more formal and less probing, and that open enforcement conferences were less productive than closed enforcement conferences.

All of the commenters stated that making enforcement conferences open impacted their cost of participation. Commenters observed that the extra time, expense, and management effort in preparation for the conference, the fact that licensees were simplifying their presentations for the benefit of the public and media, and the fact that licensees felt compelled to send legal, public relations, and other staff to the conference because of the possibility of public attendance. Commenters were concerned that technical issues would need to be simplified to ensure public and media understanding. One commenter based the extra cost on the fact that the licensee would likely be incurring the cost of State personnel travel.

As to whether the public benefited from the ability to observe enforcement conferences, a few commenters said yes, while most said no. Commenters stated that open enforcement conferences have not been well attended, that enforcement conferences normally include complex technical issues with

no provisions for educating the public or media on the issues, and that enforcement conferences have not been scheduled at times convenient to public attendance.⁹

Although a few commenters supported transcribing open enforcement conferences and subsequently making them publicly available as an alternative to conducting open conferences, most commenters did not favor transcribing open enforcement conferences. The bases for the comment included that transcriptions would further constrain communications, that they would chill candor, that they could cause the NRC and licensees to become more defensive and less open to new information, that they could be misinterpreted and taken out of context, and that they would serve little purpose.

With regard to NRC participation in open enforcement conferences by telephone, some commenters stated that NRC Headquarters' participation should not affect whether an enforcement conference is public. Some commenters stated that the NRC should be allowed to use any means to collect and understand information provided by licensees, that telephone participation was a better use of resources, and that telephone participation might be appropriate for discussing minor issues. Several commenters noted the limitations of telephone participation in that telephone participants would not be able to view written materials.

Most commenters did not favor allowing the public to listen to open enforcement conferences by telephone, based on the view that public attendance by telephone would have the same negative impact as public attendance in person. Some commenters stated that public access by telephone would be preferable to no access, but that public attendance would be better. Others supported allowing the public to listen in when an enforcement conference is conducted by telephone. Some commenters mentioned that, if the public listened in by telephone, it should not be at the NRC's or licensee's expense.

The majority of commenters did not favor making open enforcement conferences a permanent part of the Enforcement Policy. The bases given for this view included that open enforcement conferences could inhibit candid discussion of technical issues not easily presented to lay-persons, that the media could take things out of context and cause misrepresentations, that enforcement conferences should be informal meetings to exchange information solely between the NRC and licensees, that many licensees may not attend open enforcement conferences and instead request hearings (causing inefficiency and increased cost), that the public and media would tend to prejudge the licensee as guilty,

⁹See Appendix F for statistics on attendance at open enforcement conferences.

that open enforcement conferences could impact an individual's reputation and career before the NRC has made a final enforcement determination, and that the added expense does not justify the purported benefit of public observation, since the public has shown little interest.

Some commenters that favored open enforcement conferences stressed that the public must be able to participate, observe, and learn the NRC rationale for mitigation. Commenters stated that closed enforcement conferences imply an NRC/licensee compromise. One commenter stated that open enforcement conferences were beneficial because they provided an opportunity for the public and other agencies to assess the significance of enforcement issues, rather than depending on sensationalized media versions. Another suggested that, if open conferences were discontinued, the NRC should still allow State or local regulator attendance.

Several commenters also addressed issues regarding open enforcement conference notification, adverse publicity prior to the issuance of enforcement actions, and opportunities for public input. One commenter stated that open conferences need more notice of the meeting and of possible cancellations. One commenter expressed the concern that enforcement conferences become enforcement actions in and of themselves when they are publicized or open to the public because the media and the public will prejudge licensees as guilty. The commenter suggested that the NRC enforcement program should not lead to an NOV or adverse publicity until completion of the process. Another commenter stated that anyone present should be able to present a prepared statement at an enforcement conference for NRC consideration.

(3) *Summary of Comments From Staff Surveys*

To help assess issues related to the four criteria in the open enforcement conference policy statement, the staff developed an internal survey. These surveys were completed after each open enforcement conference.

A strong majority of staff responses indicated that conducting open enforcement conferences did not impact the NRC's ability to conduct meaningful conferences and/or implement the NRC's enforcement program. An overwhelming majority also indicated that conducting open enforcement conferences did not impact licensees' participation in enforcement conferences. The staff observed little or no difference in the candor and manner of communications with licensees, and found that most licensees were freely admitting violations and thoroughly explaining root causes.

The staff indicated that the agency had expended additional resources during initial stages of the trial program (based

on extra staff preparation, additional staff attendance, and special equipment purchases). As experience was gained in conducting open enforcement conferences, however, the staff indicated that this resource expenditure lessened. Staff comments did indicate that open enforcement conferences frequently increased demands on the agency's public affairs staff (based on associated press releases and attendance).

Finally, staff responses indicated that open enforcement conferences have not been widely attended by members of the media or members of the public.

b. Discussion: Continuation of Open Enforcement Conferences

The NRC has a longstanding practice of conducting business in an open manner, providing the public with the fullest information practicable on its activities while balancing the need for the NRC staff to exercise its regulatory and safety responsibilities without undue administrative burden.¹⁰ Enforcement conferences have traditionally been closed meetings between the NRC and licensees to exchange information regarding potential safety issues. The trial program was intended to evaluate whether that practice should be changed.

(1) Inhibiting Communications

The most significant concern in allowing public observation at enforcement conferences is that open conferences could inhibit open and candid discussions between the NRC and licensees, limit the free exchange of information, and thereby reduce conference effectiveness and negatively impact the effectiveness of the enforcement program. Before the trial program was implemented, this concern was shared by the regulated industry as well as by many NRC staff and managers.

Although many industry commenters continued to reiterate this concern, the Review Team does not find that open enforcement conferences conducted during the trial program were substantially less frank and open, nor was the NRC prevented from obtaining the information required to implement its enforcement program. The staff did indicate, in certain cases, the need to ask licensees additional questions, but the information ultimately provided was always sufficient to meet enforcement conference goals. Several licensees also commented that the information they had conveyed in open enforcement conferences was of the same

¹⁰The Review Team recognizes that having highly technical meetings open to the public exposes participants to the risk that information may be misunderstood or misconstrued; however, the Team does not find that risk to be of sufficient concern to outweigh the public confidence gained by allowing open observation of NRC enforcement conferences. Public observation at NRC meetings is the normal policy of the agency ("Staff Meeting Open to the Public; Final Policy Statement," 59 FR 48340, September 20, 1994).

quality and quantity as if the conferences had been closed.

(2) *Additional Resource Demands*

The Review Team considered licensee concerns regarding the added expense of conducting open enforcement conferences. The intent of making enforcement conferences open is not to make the process more expensive for licensees, nor to divert resources from safety issues. Although the Team recognizes licensees' motivations regarding enforcement conference presentations, licensees should keep in mind that the NRC is the audience to whom they must convey information.

The NRC must also be careful to balance providing public opportunities for observation of the regulatory process against the need to exercise its regulatory and safety responsibilities without undue administrative burden. Although some additional resources were spent initially, the Review Team finds that the long-term resource impact of the trial program was nominal. To manage the impact on agency resources, the Review Team recommends that, if adopted, open enforcement conferences be conducted similar to other open meetings and similar to previous practices for enforcement conferences (see the discussion on "Conduct of Open Enforcement Conferences," below).

(3) *Conclusion*

Although open enforcement conferences were not widely attended during the trial program, the Team believes that opening enforcement conferences is consistent with the agency's principles of good regulation. The intent of open conferences was not to maximize public attendance, but rather to provide the public with an opportunity to observe the regulatory process publicly and candidly.

After considering the impact on the NRC's ability to exercise its regulatory and safety responsibilities, the impact on the candor and openness of communications during enforcement conferences, the impact on NRC resources, and the benefit to the public, the Review Team recommends that the Enforcement Policy be modified to provide that most enforcement conferences be open to public observation. While, as for any public meeting, the NRC retains the discretion to close the conference for a specific case, the Review Team believes that the criteria for closing enforcement conferences addressed in Section I of the trial program policy statement are normally sufficient.

The Team also recommends that the Policy be clear that enforcement conferences are open for public observation and not participation. This is consistent with the agency's policy on open meetings.

c. *Conduct of Open Enforcement Conferences*

To manage the impact on agency resources, the Review Team recommends that open enforcement conferences be conducted similar to other open meetings and similar to previous practices for enforcement conferences. These provisions include: (1) using notification mechanisms already in place for open meetings, (2) normally holding conferences in the regional offices, (3) allowing limited staff participation by telephone, and (4) not requiring the NRC to routinely transcribe or tape-record open conferences. These four issues are addressed below.

(1) *Notification for Open Enforcement Conferences*

On September 20, 1994, the NRC published its final policy statement on staff meetings open to the public (59 FR 48340). As part of the policy statement, the NRC established mechanisms for public notification, including a toll-free telephone recording, a toll-free electronic bulletin board, weekly distribution of public meeting announcements to the press, and posting meeting announcements in the NRC PDR. The Review Team believes that these mechanisms provide sufficient notice to the public for open meetings, and should, therefore, provide sufficient notice for open enforcement conferences. Although direct mailing (as one commenter suggested) could provide interested citizens with direct notification, it would impose too great an administrative burden on the agency.

Further, the Team believes that the public has a responsibility to take action to access available information to decide if they are interested in attending a particular enforcement conference. The Team also believes that providing 10 days notice (consistent with the current policy on open meetings) provides sufficient notice to the public. Providing more notice (as several commenters suggested) would impact the agency's responsibility to implement the enforcement program in a timely manner.

During the trial program, notification was also provided by the press releases announcing open conferences. For additional discussion on whether press releases should be continued, see Section II.C.2.e, below.

(2) *Location of Open Enforcement Conferences*

Enforcement conferences have routinely been held in the regional offices. Although holding open enforcement conferences near licensed facilities could provide individuals with a greater opportunity to observe the agency's regulatory process, the Review Team believes that doing so would impact the agency's ability to carry out its regulatory and safety responsibilities and create a resource burden. The NRC may conduct over 100 enforcement

conferences in a year. Conducting enforcement conferences near licensed facilities would have a significant impact on NRC resources, both in the time spent in travel by NRC managers and inspectors and in the related costs. The NRC could also be burdened with the cost of securing a facility to conduct certain enforcement conferences.

The Review Team notes that the purpose of conducting open enforcement conferences is not to maximize public attendance, but rather to provide the public the opportunity to observe how the NRC conducts this phase of the enforcement process, while balancing the need for the NRC staff to exercise its regulatory and safety responsibilities without undue administrative burden. The Review Team believes that a practice of normally holding open enforcement conferences at the regional offices meets this objective.

(3) *Telephone Participation and Telephone Conferences*

Enforcement conferences have also routinely included Headquarters staff participation by telephone. This practice was established to control agency resources while providing agency-wide perspectives on enforcement issues, thereby enhancing the NRC's ability to efficiently and effectively implement its enforcement program. Given the agency benefit, the Team believes that it is appropriate to allow Headquarters staff participation by telephone for open enforcement conferences. Telephone participation is enhanced by ensuring that written materials and handouts are faxed to Headquarters participants.

The Review Team also believes that enforcement conferences should not be open if they are being conducted exclusively by telephone. This is consistent with the definition of a public meeting in the Commission's policy statement on open meetings, and with the current practice during the trial program.

Although allowing public observation by telephone would increase the opportunity for the public to observe the regulatory process, the Team questions whether it would represent a meaningful opportunity. Many enforcement conferences involve technically and scientifically complex matters that would be difficult for the general public to follow during a telephone conference call. Observation by telephone would be further limited because written materials would not be available to the public and the public would not be able to easily distinguish between NRC and licensee speakers. The quality of the telephone communications may compound the difficulty of following the discussions. Moreover, providing for public observation by telephone could be disruptive to enforcement conference proceedings and could present an administrative burden. The Team

believes that allowing public observation when conferences are held in the regional offices provides a sufficient opportunity for the public to observe the enforcement process.

(4) *Transcribing or Tape-Recording Open Enforcement Conferences*

The Review Team also believes that enforcement conferences should not routinely be transcribed or tape-recorded. Enforcement conferences have not normally been transcribed unless the agency believes that circumstances warrant a written record (e.g., the case involves a potential wrongdoing issue, or action against an individual). The Team believes that transcribing (or tape-recording) all enforcement conferences would represent an administrative burden without a commensurate benefit. Current mechanisms are already in place to notify the public of the outcome of enforcement conferences, by placing enforcement conference summaries and enforcement actions in the PDR. The Review Team also notes that for normal cases, the agency has been able to implement its enforcement program without the use of transcriptions or tape recordings.

The NRC began the practice of tape-recording open enforcement conferences as a precautionary measure to ensure that the agency had its own record of proceedings in the event a licensee or member of the public recorded an open enforcement conference and subsequently referenced it. This practice has become an administrative burden both in equipment purchases and in the effort of making the recordings available in the PDR. The Team notes that the tape-recordings from open conferences have seldom been used in the enforcement process. Moreover, the Team believes that if an agency record is required, then a transcript should be used instead of a tape-recording. The Team recommends that the practice of tape-recording open enforcement conferences be discontinued.

d. *Treating Enforcement Conferences as Predecisional*

A major reason why licensees did not support open enforcement conferences was their concern that the public and the media would consider licensees "guilty" simply by participating in enforcement conferences. Licensees expressed their concern that, despite the fact that the agency has not yet issued an enforcement action, the open enforcement conference becomes an enforcement action in itself because of the associated publicity.

The Review Team agrees that enforcement conferences should be viewed as predecisional. While it is true that the decision to hold an enforcement conference generally means that the staff believes escalated enforcement action may be warranted, the final decision has yet to be made.

In view of making enforcement conferences open, the Team believes it is important that NRC emphasize the meeting's predecisional nature as an early evaluative stage in the enforcement process. Based on past data, up to 30 percent of enforcement conferences do not result in escalated enforcement action. Accordingly, the Review Team recommends that the *NRC Enforcement Manual* guidance continue to require that the staff acknowledge and emphasize the preliminary nature of enforcement conferences, and that the apparent violations being discussed are subject to review and may change prior to any resulting enforcement action.

In addition, the Team recommends that enforcement conferences be renamed "predecisional enforcement conferences." The Team believes that the use of this term in the Enforcement Policy, public announcements, and licensee correspondence will emphasize that the plan to hold an enforcement conference does not mean that a violation has occurred or that escalated enforcement action will be taken.

e. *Use of Press Releases to Announce Open Enforcement Conferences*

During the trial program, press releases were normally issued for open enforcement conferences, and typically highlighted the fact that the enforcement conferences were open as part of a trial program. Both before and during the trial program, press releases were not issued for closed enforcement conferences. In recommending that the open enforcement conference policy be made permanent, the Review Team believes that the use of press releases for open enforcement conferences should be reconsidered (see also the discussion of publicity in Section II.A.6.b).

At the outset, the Team notes that the NRC's Office of Public Affairs (OPA) strongly supports continuing to use press releases for open enforcement conferences, for several reasons. First, OPA would characterize the open enforcement conference as a significant NRC action, and therefore a matter on which the Commission should inform the public. Secondly, a press release should not be viewed as an instrument of enforcement, but rather as an effort to build and retain credibility with the public (again, by providing helpful information on significant NRC action in the public domain). Thirdly, a "bare-bones" notice in the PDR and electronic bulletin boards will not reach most reporters or interested members of the public, which in OPA's opinion belies the concept of an "open" conference. Finally, since the PDR and bulletin boards are monitored by anti-nuclear groups who might be expected to issue their own press releases, OPA feels that the resultant publicity would in many cases be negatively skewed.

The Team discussed this issue at length. The Team agrees that press releases are appropriate for significant NRC actions. In the Team's view, however, enforcement conferences are not of themselves significant agency actions, but rather are *predecisional* to what may later result in a significant agency action. For comparison, the Team observes that press releases are

characteristically made at the time an NOV with CP is issued, but are *not* made when an NOV of the same severity is not accompanied by a CP. This distinction is made based on the relative significance of the two actions; from this line of reasoning, issuing press releases for open conferences suggests that the predecisional conference itself may be more significant than the resulting enforcement action. The Team notes again that many conferences do not result in CPs, and some do not even result in enforcement action (see the Appendix F data).

Moreover, the publicity associated with issuance of significant enforcement actions has traditionally been viewed as reinforcing the action itself. While the Team agrees that the press release should not be viewed as an instrument of enforcement (i.e., it is not intended to serve as a sanction), the Team also notes that both large and small licensees view the negative publicity and attention resulting from the press release as having a greater impact than the financial impact of the CP. The NRC believes that licensees will be motivated to identify and correct violations if they believe that the CP will be fully mitigated as a result; that motivation may be increased by the desire to avoid the negative publicity associated with the CP press release. Issuing press releases at the predecisional enforcement conference stage will, in essence, appear to the licensee as if a sanction is being received before the agency has in fact reached an enforcement decision. Thus, to issue a press release at this stage is inconsistent with the predecisional nature of the conference, and may interfere with the incentive system built into the proposed enforcement approach.

The Team also recognizes the contention that, when a press release is issued at various stages of a single enforcement action, the public may often mistakenly interpret each press release to be related to a separate licensee failure. For instance, when a violation is revealed through an event, a press release might be issued for the event if significant enough. If an Augmented Inspection Team (AIT) is sent to the site, a second press release may be issued to report the AIT findings. If escalated action results, press releases might also conceivably be issued for the conference (if open), for the Proposed Imposition of Civil Penalty (if applicable), and for any later significant revision to the CP action. Depending on the time elapsing between press releases and the clarity of each description, a member of the public might believe that three or four separate problems have occurred. This concern reinforces the Review Team's view that press releases should not be issued for predecisional enforcement conferences.

The Review Team notes again that the reason for conducting open conferences is not to maximize or facilitate public attendance at NRC meetings. Rather the intent is to conduct the agency's business in public, to the extent practical. Based on this understanding, the Team recommends that open enforcement conferences be treated similarly to other open meetings. In other words, open enforcement conferences should normally be announced

through existing public meeting notification mechanisms as described in Manual Directive 3.5, Part 2, Section A. Information associated with the conference, such as the conference summary and inspection report, should be made publicly available, as in current practice. Press releases should not routinely be issued for open conferences, but rather issued only when specific issues exist that the agency believes are of sufficient interest to the public, as would occur with other meetings of the NRC.¹¹ In the event press releases are issued, they should include standard language that acknowledges and emphasizes the predecisional nature of the meeting, and should note that the apparent violations being discussed are subject to review and may change prior to any resulting enforcement action.

As a final observation in this area, the Team recognizes that some may feel that no longer issuing press releases for open enforcement conferences will be perceived as a move toward being less open. The Team disagrees; in fact, this change in practice simply reflects the transition from the open enforcement conference trial program (in which only 25% of conferences were open) to a permanent policy in which conferences are normally open. As such, this change removes the need to distinguish by a press release those conferences that will be open to the public.

¹¹For example, press releases are issued for significant Commission meetings on a case-by-case basis only.

II.G: Implementation, Delegation, and Oversight

3. *Commission Consultation*

Most enforcement decisions are made at the staff level; however, based on guidance given in Section III of the Enforcement Policy, "Responsibilities," certain situations require formal Commission consultation. The practice of providing Commission consultation has existed since the Enforcement Policy was first published as an interim Policy in 1980. Since then, the number of criteria requiring this consultation has more than doubled.

The Review Team believes that there may be less need now for mandatory Commission involvement. Most of the criteria for consultation were adopted in earlier years, to address particular Commissioner concerns or areas where the staff had little experience. As currently administered, the staff has had substantial experience in implementing the objectives of the Enforcement Policy, and it is relatively rare that the Commission changes the recommended staff approach. Senior NRC management is sensitive to issues of Commission concern. The Office of Enforcement is positioned to closely coordinate enforcement action reviews with senior regional and program office management, as well as with the EDO and DEDOs, when necessary.

Based on these factors, and considering the significant effort currently expended in providing Commission consultation on enforcement matters, the Review Team recommends that the staff be given more flexibility to decide what enforcement issues should be brought to the Commission's attention because of policy significance, controversy, or known Commission interest. As part of this recommendation, the Team believes that OE should prepare a annual report summarizing significant actions taken, cases where the exercise of discretion resulted in deviating from standard practice, needed policy changes, audit results, timeliness data, and other enforcement issues that may be of interest to the Commission.¹² This report should also replace the monthly and quarterly timeliness reports provided to the Commission.

As stated earlier, Section III of the Enforcement Policy currently requires Commission consultation prior to taking action in ten specific situations (unless the urgency of the situation dictates immediate action). These situations, with the Team's recommended changes, are discussed below:

- (1) Description: "An action affecting a licensee's operation that requires balancing the public health and safety or common defense and security implications of not operating with the potential radiological or other hazards associated with continued operation;"

¹²To be useful, this report will provide predecisional information, and should not be publicly disclosed without Commission approval.

Recommendation: This provision has existed since 1980 and the Team believes that it should be maintained, based on scope and significance.

- (2) Description: "Proposals to impose civil penalties in amounts greater than 3 times the Severity Level I values shown in Table 1A;"

Recommendation: The basic requirement to consult with the Commission before issuing large CPs has existed since 1980 and has been modified several times. The Team agrees with the importance of consulting with the Commission in these cases, but would clarify the existing provision to indicate that the CPs in question are those issued for a single violation or problem.

- (3) Description: "Any proposed enforcement action that involves a Severity Level I violation;"

Recommendation: This provision was first introduced in the 1984 Policy revision. Because these cases involve the most significant level of violations and occur on an infrequent basis, the Team believes it is appropriate to continue to consult with the Commission before their issuance.

- (4) Description: "Any enforcement action that involves a finding of a material false statement;"

Recommendation: This provision was first introduced in the 1984 Policy revision. The description of a communication failure as a material false statement is reserved for egregious violations and is made on a case-by-case basis. Because of the egregious nature of these cases, it is logical that they would be considered very significant regulatory concerns and likely categorized at SL I. Because the staff is already required to consult with the Commission on cases involving SL I violations, the Team believes that it is not necessary to include this specific provision.

- (5) Description: "Exercising discretion for matters meeting the criteria of Section VII.A.1 for Commission consultation;"

Recommendation: This provision was first introduced in the 1992 Policy revision. Section VII.A.1 provides added flexibility in the CP assessment process, and requires Commission consultation if the difference between the amount of the CP proposed under this discretion and the amount of the CP assessed under the normal process is more than two times the base CP value given in Table 1A or 1B. Given the staff's experience in implementing the Commission's enforcement program objectives--including the exercise of discretion--the Team believes that each case should be judged on its own merits to determine whether Commission consultation is warranted, rather than routinely requiring it.

- (6) Description: "Refraining from taking enforcement action for matters meeting the criteria of Section VII.B.3;"

Recommendation: This provision was first introduced in the 1987 Policy revision. Section VII.B.3 addresses violations identified during extended shutdowns or work stoppages. Given the staff's experience in implementing the Commission's enforcement program objectives, including the exercise of discretion, the Team believes that each case should be judged on its own merits to determine whether Commission consultation is warranted, rather than routinely requiring it.

- (7) Description: "Any proposed enforcement action that involves the issuance of a civil penalty or order to an unlicensed individual or a civil penalty to a licensed reactor operator;"

Recommendation: This provision was first introduced in the 1991 Policy revision. The Team believes this criterion should be deleted. Given the staff's experience in implementing the Commission's enforcement program objectives on issuing orders to individuals, the Team believes that each case should be judged on its own merits to determine whether Commission consultation is warranted, rather than routinely requiring it. The Team also observes that, under the current Policy, CPs are not normally issued to unlicensed individuals or operators, and any such case would receive Commission consultation under Criterion 8, below.

- (8) Description: "Any action the EDO believes warrants Commission involvement;"

Recommendation: The Review Team believes it is appropriate to maintain this provision.

- (9) Description: "Any proposed enforcement case involving an Office of Investigations (OI) report where NRC staff (other than OI staff) does not arrive at the same conclusions as those in the OI report concerning issues of intent if the Director of OI concludes that Commission consultation is warranted;"

Recommendation: This basic provision was first introduced in the 1992 Policy revision and recently modified in a 1994 revision. The Review Team believes that it is appropriate to maintain this provision.

- (10) Description: "Any proposed enforcement action on which the Commission asks to be consulted."

Recommendation: This provision has existed since 1980, and the Review Team believes it should be maintained.

In addition to these changes to Section III of the Policy, the Team notes that the Enforcement Policy currently requires that the Commission

be provided advance notification of: (1) all enforcement actions involving CPs or orders; (2) those cases where discretion is exercised as discussed in Section VII.B.6 of the Policy (i.e., reducing or refraining from issuing a CP or an NOV for an SL II or III violation where the staff concludes that application of the normal guidance in the Policy is unwarranted); and (3) certain actions against unlicensed individuals and persons described in Section VIII. The Review Team believes that it is appropriate to continue to notify the Commission of actions involving CPs and orders by way of the EN process. Given the experience the staff has had in implementing the objectives of the Commission's enforcement program and exercising discretion, the Review Team recommends that these mandatory notification provisions be removed. Instead, the Review Team recommends that the staff address the use of discretion in the proposed annual report, or as warranted when the staff believes that the Commission should be aware of a particular issue.

By Staff Requirements Memorandum (SRM) dated December 23, 1991, the Commission directed that any escalated action related to maintenance programs be sent to the Commission for a "negative consent" review. The SRM direction was implemented by Enforcement Guidance Memorandum (EGM) 92-01T (January 2, 1992).¹³ This provision applies to programmatic maintenance failures, and does not refer to failures to follow maintenance procedures or failures to perform post-maintenance testing. The Review Team recommends that each such case be judged on its own merits to determine whether Commission consultation is warranted, rather than routinely requiring it.

¹³See NRC Enforcement Manual, Appendix A-3.

**OPEN PREDECISIONAL
ENFORCEMENT CONFERENCE
STATISTICS**

Attachment 3

7/10/92 - 6/30/96

ENFORCEMENT CONFERENCES ¹	REACTOR LICENSEES	HOSPITAL LICENSEES	OTHER LICENSEES	TOTAL
OPEN	62	20	31	113
CLOSED	177	57	79	313
TOTAL	239	77	110	426

CONFERENCES WITHOUT PUBLIC ATTENDANCE	73
CONFERENCES WITH PUBLIC ATTENDANCE ²	40
RANGE OF PUBLIC ATTENDANCE	1 - 20
AVERAGE PUBLIC ATTENDANCE ³	3.4
CONFERENCES WITH 1 TO 3 OBSERVERS	32
CONFERENCES WITH MORE THAN 3 OBSERVERS	8

¹ Does not include enforcement conferences exempt from trial program, e.g., those involving an individual, an OI report, safeguards or privacy information, etc.

² Public attendance includes members of the media, State government representatives, and interested citizens.

³ Based on conferences that had public attendance.

[7590-01-P]

NUCLEAR REGULATORY COMMISSION

Policy and Procedure for Enforcement Actions; Policy Statement

AGENCY: Nuclear Regulatory Commission.

ACTION: Policy statement: Revision.

SUMMARY: The Nuclear Regulatory Commission (NRC or Commission) is amending its General Statement of Policy and Procedure for Enforcement Actions (Enforcement Policy) to revise the list of enforcement matters on which the NRC staff must consult with the Commission, to modify the Policy to provide that most predecisional enforcement conferences will be open to public observation, to clarify the circumstances in which a licensee-identified violation will be treated as a non-cited violation, and consideration of risk in developing sanctions.

DATES: This revision is effective on [date of publication in the Federal Register].
Comments are due on or before (30 days after publication in the Federal Register).

ADDRESSEES: Send written comments to: The Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, ATTN: Docketing and Service

Branch. Deliver comments to: 11555 Rockville Pike, Rockville, Maryland 20852, between 7:45 am and 4:15 pm, on Federal workdays. Copies of comments may be examined at the NRC Public Document Room, 2120 L Street, NW. (Lower-Level), Washington, DC.

FOR FURTHER INFORMATION CONTACT: James Lieberman, Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555 (301) 415-2741.

SUPPLEMENTARY INFORMATION:

The "General Statement of Policy and Procedure for NRC Enforcement Actions" (Enforcement Policy or Policy) was first issued on September 4, 1980. Since that time, the Enforcement Policy has been revised on a number of occasions. On June 30, 1995 (60 FR 34381), the Enforcement Policy was revised in its entirety and was also published as NUREG-1600. The Policy primarily addresses violations by licensees and certain non-licensed persons, as discussed further in footnote 3 to Section I, Introduction and Purpose, and in Section X: Enforcement Action Against Non-licensees. As described below, the Commission is amending the Enforcement Policy to address issues regarding consultation with the Commission, open predecisional enforcement conferences, non-cited violations, and risk-significant violations.

Commission consultation

Most enforcement decisions are made at the NRC staff level. However, based on guidance in Section III of the Enforcement Policy "Responsibilities," certain cases require formal Commission consultation. The practice of Commission consultation has existed since the Enforcement Policy was first published as an interim Policy in 1980. After 1980, the number of cases requiring this type of consultation has more than doubled. Most of the criteria for consultation were adopted many years ago, to address particular Commissioner concerns or areas where the NRC staff had little experience. The NRC staff has had substantial experience in implementing the objectives of the Enforcement Policy. It is relatively rare that the Commission deviates from the recommended NRC staff approach. Thus, there is less need for mandatory Commission involvement in many enforcement matters.

Based on these factors and considering the significant effort currently expended in providing Commission consultation on enforcement matters, the Commission has given the NRC staff more flexibility to decide what enforcement issues should be brought to the Commission's attention because of policy significance, controversy, or known Commission interest.

Section III of the Enforcement Policy is being modified to delete the specific requirements for consultation with the Commission before the NRC staff issues enforcement actions involving material false statements, orders or civil penalties to unlicensed individuals, or civil penalties to licensed reactor operators. Because of the egregious nature of material false statement cases, it is logical that they would be considered very significant regulatory concerns and be categorized at Severity Level I and require Commission consultation on that basis (Section III(10) of the Enforcement

Policy). The Commission believes that consultation regarding individual actions should be based on the merits of the particular case. Further, under the current Policy, civil penalties are not normally issued to unlicensed individuals or operators. These cases would receive Commission consultation at the request of the Executive Director for Operations (EDO). The Commission receives advance notification of all orders, including those issued to unlicensed individuals.

In addition, consultation will no longer be required when the NRC staff exercises discretion under Section VII.B.2¹⁴ and refrains from taking enforcement action for certain violations identified during extended shutdowns. The Commission will receive advance notification through Enforcement Notifications (ENs) for the first exercise of discretion for a plant meeting the criteria of Section VII.B.2. Notification, not consultation, will be required when the NRC staff exercises discretion under Section VII.A.1 in matters in which the civil penalty to be proposed deviates from more than two times the amount of the base civil penalty. However, item (2) of Section III of the Policy is being clarified to require consultation when the NRC staff proposes a civil penalty greater than 3 times the Severity Level I values shown in Table 1A for a single violation or problem. The NRC staff will continue to provide notification to the Commission for all civil penalties and orders.

Predecisional Enforcement Conferences

Historically, the Enforcement Policy has provided that enforcement conferences

¹⁴ After the issuance of NUREG-1525, Section VII.B.3 of the Enforcement Policy was renumbered as Section VII.B.2.

are closed meetings between the NRC and licensees to exchange information on potential safety issues. Section V of the current Enforcement Policy states that conferences, "are not normally open to the public observation." However, on July 10, 1992, the Commission established a 2-year trial program to determine if the Policy should be changed to make most enforcement conferences open to the public. On July 19, 1994, the NRC announced that the trial program would be continued until the Commission had acted on the enforcement review team's recommendations.

The announcement of the trial program explained that the Commission's decision on whether to establish a permanent policy for making enforcement conferences open would be based on an assessment of the following criteria:

- (1) Whether the fact that the conference was open impacted the NRC's ability to conduct a meaningful conference and/or implement the NRC's enforcement program;
- (2) Whether the open conference impacted the licensee's participation in the conference;
- (3) Whether the NRC expended a significant amount of resources in making the conference public; and
- (4) The extent of public interest in opening the enforcement conference.

Under the trial program, approximately 25 percent of all eligible enforcement conferences were open to public observation. Open enforcement conferences were conducted in each regional office and with various types of licensees. Members of the public attended 40 of the 113 open conferences conducted. In most cases, three or fewer members of the public attended. The Commission received and evaluated comments from licensees and members of the public.

The most significant concern in allowing public observation at enforcement conferences was that open conferences could inhibit open and candid discussions between the NRC and licensees, limit the free exchange of information, reduce conference effectiveness, and negatively impact the enforcement program. Although industry reiterated this concern during the trial program, the Commission has not found that open enforcement conferences conducted during the trial program were substantially less frank and open, nor was the NRC prevented from obtaining the information required to implement its enforcement program. In some cases, the NRC staff needed to ask licensees additional questions, but the information ultimately provided was always sufficient to meet predecisional enforcement conference goals.

Opening predecisional enforcement conferences is consistent with the agency's principles of good regulation and normal agency policy ("Staff Meetings Open to the Public; Final Policy Statement," 59 *FR* 48340; September 20, 1994). The intent of open conferences is not to maximize public attendance, but to provide the public with an opportunity to observe the regulatory process. Although making highly technical meetings open to the public exposes participants to the risk that information may be misunderstood or misconstrued, the Commission does not find that the risk outweighs the public confidence gained by allowing open observation of NRC predecisional enforcement conferences.

After considering the impact on the NRC's ability to exercise its regulatory and safety responsibilities, the impact on the candor and openness of communications during enforcement conferences, the impact on NRC resources, and the benefit to the public, the Commission has decided to modify the Enforcement Policy to provide that most

conferences will be open to public observation. However, as for any public meeting, the NRC retains the discretion to close the conference for a specific case. The criteria for closing conferences are currently addressed in Section V of the Enforcement Policy.

With two additions, these criteria will continue to be used. The changes involve opening a conference if it is based on an NRC Office of Investigations (OI) report that has been publicly disclosed and providing flexibility to open or close a conference with the approval of the Executive Director for Operations. The Enforcement Policy will continue to emphasize that predecisional enforcement conferences are open for public observation and not participation consistent with the NRC's policy on open meetings.

Non-Cited Violations

The Enforcement Policy provides examples of when discretion generally should be considered for departing from the normal approach under the Policy. Section VII.B.1 addresses non-cited violations (NCVs) which are used to recognize the existence of a legal violation but are not formal violations. NCVs are used to provide an incentive to licensees to identify and correct violations. Example 1.a. in Section VII.B.1. is a Severity Level IV violation that was "identified by the licensee, including identification through an event."

This discretion is normally used when the licensee identifies and corrects a non-recurring violation. However, this provision is not normally used for violations that meet the criteria for Severity Level III violations, and where the circumstances justify characterization at Severity Level IV. Such cases normally are the more significant Severity Level IV violations. In addition, the NRC has considered whether this exercise

of discretion should normally be used in cases involving violations identified through an event. If the root cause of the event is obvious or the licensee had prior opportunity to identify the problem but failed to take action that would have prevented the event, the licensee should not be rewarded by the NRC's exercising discretion not to cite the violation. On the other hand, there may be cases when, notwithstanding a self-disclosing violation, the licensee demonstrated initiative in identifying the violation's root cause. In such a case, an NCV may be appropriate.

In general, when the licensee's identification is through an event, discretion should only be exercised when the licensee has demonstrated initiative. Further, the violation should be cited if it caused the event, the cause is obvious, or a clear opportunity existed to identify the violation and take action to prevent the event. The Commission believes that the Enforcement Policy should be clarified by deleting the reference to identification through an event in the example in Section VII.B.1.(a) to make it clear that use of discretion is not automatic if the violation is identified through a self-disclosing event.

Risk-significant Violations

In evaluating violations for enforcement, the higher the risk from a violation, the greater the severity level and sanction should be. However, the converse is not necessarily true; low risk should not necessarily result in no sanction or a minor violation being cited. This is because many violations, although having low risk significance, may indicate a broader problem, often indicative of a programmatic licensee failure to comply with NRC requirements and, therefore, have a high regulatory significance.

The Enforcement Policy currently does not address risk explicitly, except in

Section VII.A.1.e, which addresses the escalation of enforcement sanctions in situations when the excessive duration of a problem has resulted in a substantial increase in risk. Although there is inherent discretion in the Enforcement Policy to increase Severity Levels and sanctions based on risk, the Commission believes it is appropriate to modify the Policy to state the consideration of risk aspects more clearly.

In analyzing risk, the NRC recognizes the uncertainties associated with risk assessment. Generally, qualitative rather than quantitative risk assessments are made given the number of variables associated with risk assessment. Risk should be a consideration in proposing enforcement actions, but not necessarily determinative. In developing higher civil penalties, the Commission intends to consider, where appropriate, assessing separate civil penalties for each violation that is aggregated into a Severity Level II problem.

Therefore, to provide sufficient discretion to be able to appropriately consider risk in enforcement decisions, Section III of the Policy is being modified to state that in considering the significance of a violation, the NRC considers the technical significance, i.e., actual and potential consequences, and the regulatory significance; and that in evaluating the technical significance, risk is an appropriate consideration. Further, Section VII.A.1.e is being modified to state that exercise of discretion should be considered in situations where the violation has resulted in a substantial increase in risk, including cases in which the duration of the violation has contributed to the substantial increase.

Paperwork Reduction Act Statement

This policy statement does not contain a new or amended information collection

requirement subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et. seq.). Existing requirements were approved by the Office of Management and Budget, approval number 3150-0011. The approved information collection requirements contained in this policy statement appear in Section VII.C.

Public Protection Notification

The NRC may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number.

Small Business Regulatory Enforcement Fairness Act

In accordance with the Small Business Regulatory Enforcement Fairness Act of 1996, the NRC has determined that this action is not a major rule and has verified this determination with the Office of Information and Regulatory Affairs of OMB.

Accordingly, the NRC Enforcement Policy is amended by revising Section III, the first paragraph in Section IV, Section V, and Sections VII.A.1.(e) and VII.B.1(a) to read as follows:

GENERAL STATEMENT OF POLICY AND PROCEDURE FOR NRC ENFORCEMENT ACTIONS

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III. RESPONSIBILITIES

The Executive Director for Operations (EDO) and the principal enforcement

officers of the NRC, the Deputy Executive Director for Nuclear Material Safety, Safeguards and Operations Support (DEDS), and the Deputy Executive Director for Nuclear Reactor Regulation, Regional Operations, and Research (DEDR), have been delegated the authority to approve or issue all escalated enforcement actions.⁴ The DEDS is responsible to the EDO for the NRC enforcement programs. The Office of Enforcement (OE) exercises oversight of and implements the NRC enforcement programs. The Director, OE, acts for the Deputy Executive Directors in enforcement matters in their absence or as delegated.

Subject to the oversight and direction of OE, and with the approval of the appropriate Deputy Executive Director, where necessary, the regional offices normally issue Notices of Violation and proposed civil penalties. However, subject to the same oversight as the regional offices, the Office of Nuclear Reactor Regulation (NRR) and the Office of Nuclear Material Safety and Safeguards (NMSS) may also issue Notices of Violation and proposed civil penalties for certain activities. Enforcement orders are normally issued by a Deputy Executive Director or the Director, OE. However, orders may also be issued by the EDO, especially those involving the more significant matters. The Directors of NRR and NMSS have also been delegated authority to issue orders, but it is expected that normal use of this authority by NRR and NMSS will be confined

⁴ The term "escalated enforcement action" as used in this policy means a Notice of Violation or civil penalty for any Severity Level I, II, or III violation (or problem) or any order based upon a violation.

to actions not associated with compliance issues. The Director, Office of the Controller, has been delegated the authority to issue orders where licensees violate Commission regulations by nonpayment of license and inspection fees.

In recognition that the regulation of nuclear activities in many cases does not lend itself to a mechanistic treatment, judgment and discretion must be exercised in determining the severity levels of the violations and the appropriate enforcement sanctions, including the decision to issue a Notice of Violation, or to propose or impose a civil penalty and the amount of this penalty, after considering the general principles of this statement of policy and the technical significance of the violations and the surrounding circumstances.

Unless Commission consultation or notification is required by this policy, the NRC staff may depart, where warranted in the public's interest, from this policy as provided in Section VII, "Exercise of Enforcement Discretion." The Commission will be provided written notification of all enforcement actions involving civil penalties or orders. The Commission will also be provided notice the first time that discretion is exercised for a plant meeting the criteria of Section VII.B.2. In addition, the Commission will be consulted prior to taking action in the following situations (unless the urgency of the situation dictates immediate action):

- (1) An action affecting a licensee's operation that requires balancing the public health and safety or common defense and security implications of not operating with the potential radiological or other hazards associated with continued operation;
- (2) Proposals to impose a civil penalty greater than 3 times the Severity Level I values shown in Table 1A for a single violation or problem;

- (3) Any proposed enforcement action that involves a Severity Level I violation;
- (4) Any action the EDO believes warrants Commission involvement;
- (5) Any proposed enforcement case involving an Office of Investigations (OI) report where the NRC staff (other than the OI staff) does not arrive at the same conclusions as those in the OI report concerning issues of intent if the Director of OI concludes that Commission consultation is warranted; and
- (6) Any proposed enforcement action on which the Commission asks to be consulted.

IV. SEVERITY OF VIOLATIONS

Regulatory requirements⁵ have varying degrees of safety, safeguards, or environmental significance. Therefore, the relative importance of each violation, including both the technical significance and the regulatory significance, is evaluated as the first step in the enforcement process. In considering the significance of a violation, the staff considers the technical significance, i.e., actual and potential consequences, and the regulatory significance. In evaluating the technical significance, risk is an appropriate consideration.

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V. PREDECISIONAL ENFORCEMENT CONFERENCES

Whenever the NRC has learned of the existence of a potential violation for which

⁵ The term "requirement" as used in this policy means a legally binding requirement such as a statute, regulation, license condition, technical specification, or order.

escalated enforcement action appears to be warranted, or recurring nonconformance on the part of a vendor, the NRC may provide an opportunity for a predecisional enforcement conference with the licensee, vendor, or other person before taking enforcement action. The purpose of the conference is to obtain information that will assist the NRC in determining the appropriate enforcement action, such as: (1) a common understanding of facts, root causes and missed opportunities associated with the apparent violations, (2) a common understanding of corrective action taken or planned, and (3) a common understanding of the significance of issues and the need for lasting comprehensive corrective action.

If the NRC concludes that it has sufficient information to make an informed enforcement decision, a conference will not normally be held unless the licensee requests it. However, an opportunity for a conference will normally be provided before issuing an order based on a violation of the rule on Deliberate Misconduct or a civil penalty to an unlicensed person. If a conference is not held, the licensee will normally be requested to provide a written response to an inspection report, if issued, as to the licensee's views on the apparent violations and their root causes and a description of planned or implemented corrective action.

During the predecisional enforcement conference, the licensee, vendor, or other persons will be given an opportunity to provide information consistent with the purpose of the conference, including an explanation to the NRC of the immediate corrective actions (if any) that were taken following identification of the potential violation or nonconformance and the long-term comprehensive actions that were taken or will be taken to prevent recurrence. Licensees, vendors, or other persons will be told when a

meeting is a predecisional enforcement conference.

A predecisional enforcement conference is a meeting between the NRC and the licensee. Conferences are normally held in the regional offices and are normally open to public observation. Conferences will not normally be open to the public if the enforcement action being contemplated:

- (1) Would be taken against an individual, or if the action, though not taken against an individual, turns on whether an individual has committed wrongdoing;
- (2) Involves significant personnel failures where the NRC has requested that the individual(s) involved be present at the conference;
- (3) Is based on the findings of an NRC Office of Investigations report that has not been publicly disclosed; or
- (4) Involves safeguards information, Privacy Act information, or information which could be considered proprietary;

In addition, conferences will not normally be open to the public if:

- (5) The conference involves medical misadministrations or overexposures and the conference cannot be conducted without disclosing the exposed individual's name; or
- (6) The conference will be conducted by telephone or the conference will be conducted at a relatively small licensee's facility.

Notwithstanding meeting any of these criteria, a conference may still be open if the conference involves issues related to an ongoing adjudicatory proceeding with one or more intervenors or where the evidentiary basis for the conference is a matter of public record, such as an adjudicatory decision by the Department of Labor. In addition, notwithstanding the above normal criteria for opening or closing conferences, with the

approval of the Executive Director for Operations, conferences may either be open or closed to the public after balancing the benefit of the public observation against the potential impact on the agency's decision-making process in a particular case. The NRC will notify the licensee that the conference will be open to public observation. Consistent with the agency's policy on open meetings, "Staff Meetings Open to Public," published September 20, 1994 (59 FR 48340), the NRC intends to announce open conferences normally at least 10 working days in advance of conferences through (1) notices posted in the Public Document Room, (2) a toll-free telephone recording at 800-952-9674, (3) a toll-free electronic bulletin board at 800-952-9676, and on the World Wide Web at the NRC Office of Enforcement homepage (www.nrc.gov/OE). In addition, the NRC normally will also issue a press release and notify appropriate State liaison officers that a predecisional enforcement conference has been scheduled and that it is open to public observation.

The public attending open conferences may observe but not participate in the conference. It is noted that the purpose of conducting open conferences is not to maximize public attendance, but rather to provide the public with opportunities to be informed of NRC activities consistent with the NRC's ability to exercise its regulatory and safety responsibilities. Therefore, members of the public will be allowed access to the NRC regional offices to attend open enforcement conferences in accordance with the "Standard Operating Procedures For Providing Security Support For NRC Hearings And Meetings," published November 1, 1991 (56 FR 56251). These procedures provide that visitors may be subject to personnel screening, that signs, banners, posters, etc., not larger than 18" be permitted, and that disruptive persons may be removed. The open

conference will be terminated if disruption interferes with a successful conference.

Members of the public attending open conferences will be reminded that (1) the apparent violations discussed at predecisional enforcement conferences are subject to further review and may be subject to change prior to any resulting enforcement action and (2) the statements of views or expressions of opinion made by NRC employees at predecisional enforcement conferences, or the lack thereof, are not intended to represent final determinations or beliefs.

When needed to protect the public health and safety or common defense and security, escalated enforcement action, such as the issuance of an immediately effective order, will be taken before the conference. In these cases, a conference may be held after the escalated enforcement action is taken.

VII. EXERCISE OF DISCRETION

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A. Escalation of Enforcement Sanctions

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1. * * *

(e) Situations when the violation results in a substantial increase in risk, including cases in which the duration of the violation has contributed to the substantial increase;

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B. Mitigation of Enforcement Sanctions

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1. *Licensee-Identified Severity Level IV Violations.* The NRC, with the approval of the Regional Administrator or his or her designee, may refrain from issuing a Notice of Violation for a Severity Level IV violation that is documented in an inspection report (or official field notes for some material cases) and described therein as a Non-Cited Violation (NCV) provided that the inspection report includes a brief description of the corrective action and that the violation meets all of the following criteria:

- (a) It was identified by the licensee;

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Dated at Rockville, MD, this day of _____, 1996.

For the Nuclear Regulatory Commission.

John C. Hoyle,
Secretary of the Commission.