

PDR  
Advisory  
Committee  
on  
Enforcement  
Policy

Minutes of the Meeting of the  
Advisory Committee for Review of the Enforcement Policy  
July 9, 1985

Attending: Dennis Wilkinson, Joseph Hendrie, Michael Hasten, Colin Diver, Howard Parris

For the NRC Staff: Karen Cyr, Jane Axelrad, Ben Hayes

Joseph Hendrie recapped the last meeting and what assignments had been made for drafting the report. He described the kinds of information the Committee has received from various people on the central problems of the enforcement. The Committee agreed that within limits of time and budget they had obtained information sufficient to enable them to write their report. The Committee members agreed that they needed to talk through each of the points that had been identified for coverage in their report and that each member would lead the discussion for the area of his responsibility and outline his proposed report.

Dr. Parris asked for additional information on the way regional inspectors are selected and trained and once on the job, how their performance is evaluated. Jane Axelrad agreed to provide that information and subsequently during the meeting did so.

Mr. Hasten began with a discussion of material false statements. He felt that the issue needs to be discussed on two levels: one, the statutory provision as interpreted by the agency and judicial opinion, and second, the malaise from the amount of concern people ascribe to the concept of material false statements. The statute says one thing and case law another, but it has been propelled into a overriding concern both to the industry and regulators. Mr. Hasten indicated he believed there was little basis in the statute (i.e., Section 186) for the position as developed today. He felt that if challenged, it would in all likelihood be stricken as beyond the scope of the statute. There was much discussion of the various staff proposals for reforming the approach to material false statements. Dr. Hendrie indicated he favored the original staff position that the phrase material false statement be restricted to willful and written statements, and if written, limited to people who ought to be able to understand responsibilities and exercise them. The committee members agreed not to base their response solely on a view of the legal basis in section 186 for material false statements. They agreed that the Commission has in its general statutory authority the authority to require the submittal of accurate information by licensees, but they felt any approach should be safety related and should be developed with a graduated scheme for sanctions. Mr. Diver described the minimum statement which should be reachable as a violation as a misstatement or an admission which was innocent yet safety related. The level of personnel making the statement shouldn't be significant for setting the minimum statement

reachable. Mr. Diver indicated he thought it was reasonable to limit material false statements to those which are carelessly made. He did not favor a strict liability approach.

During the discussion of what kinds of statements should be labeled material false statements, Ben Hayes, Director of the Office of Investigations (OI), spoke to the committee members and briefly discussed the kinds of investigations and inquiries that his office conducts. Mr. Hayes indicated that his office has handled approximately 550 cases in all which includes both those described as inquiries as well as full scale investigations. Inquiries consist of making phone calls to contact the original alleged, and making a determination of whether or not to conduct a full scale investigation. The amount of time spent by his staff between investigations and inquiries is divided about 50-50, although the number of inquiries is much greater than the number of full scale investigations. OI has 23 investigators on its staff. Recently the staff and OI have developed a form to be used by the staff in requesting OI to do investigations which will help try to bring into focus what wrongdoing is thought to be involved. Mr. Hayes indicated he favored limiting material false statements to those cases where the person making the statement was intentionally misleading. He did not favor having it include mistakes or errors nor did he favor including careless disregard in material false statements. He felt the dividing line between material false statements and the other category of information that would be labeled misinformation depended upon the state of mind of the individual making the statement.

The question of timeliness of enforcement actions which are based on OI investigations was discussed. Mr. Hayes indicated that lack of staff was a significant factor in the delay but felt that only a small minority of cases are actually delayed because of OI involvement.

Dr. Hendrie led the discussion of the next section of the report beginning with the discussion of the impact of timeliness on enforcement actions. The group discussed the purpose of civil penalties and the influence of timeliness. Dr. Hendrie felt the civil penalty was designed to encourage the offender to mend his ways and for this reason timeliness is important. Professor Diver felt that so long as the licensee can associate in his mind the facts of the violation with the penalty that follows then it serves its purpose. The important element is the certainty of receiving the penalty for the violation which occurs. The Committee felt that the ten-week objective which is set forth in the IE Manual 0400 is a good goal if it can be met. There was discussion among the Committee members of the desirability of the existing policy which provides that for Severity Level IV and V violations which meet three criteria, no citation is made. There was concern about the inability to track such violations and therefore the inability to keep track of the overall violation rate for licensees. However, the Committee members concluded that this did not seem to be a significant problem.

The Committee members discussed the enforcement conference and the differences in approaches of the various regions. Two regions hold

enforcement conferences after the inspection reports are issued. The other three issue the inspection reports only at the time the NOV is issued. The relationship between the exit interview and the enforcement conference was also discussed.

The issue of publicity surrounding notices of violation and civil penalties was discussed. Professor Diver discussed an FTC case which found that it was permissible for the agency to issue a press release that tracks the indictment. He emphasized that any publicity release ought to be factual. Dr. Hendrie was concerned that to be fair a press release ought to include statements that the violations have been corrected and the plant is now operational if that is the case. Professor Diver agreed that the press release should state what action had been taken in response to the violation.

Mr. Diver led the discussion on Section V of the report. He reported on the initial results of the statistical profiles of 11 plants that he had been conducting. He has been attempting to test the hypothesis that tougher enforcement during the period of 1980 to 1981 has had some impact on licensee performance. The measures of performance are all indirect. He tested the number of violations and their severity; these have gone down. He looked at LERs and outages. These have also gone down. SALP ratings have gone up. He indicated that by looking at inspection hours from 1977 to 1980 he concluded the agency is spending about as much time as before on inspections. There seems to be little correlation between inspection hours and the number of violations found. He looked at the question of whether regions are writing up fewer violations. There seemed to be some indication that the year after a penalty is assessed the nature and severity of violations more often decreased than increased. This could be due to either the utility shaping up in that year or the NRC feeling sorry for them and issuing less penalties. However, there seem to have been penalties in a number of consecutive years for utilities so he did not feel that it was a situation where NRC was feeling sorry for the licensee.

Mr. Diver outlined his approach to the section of the report. He indicated that the purpose of the enforcement policy is deterrence; that is, to serve as an incentive for compliance with the rules. Enforcement should focus on preventable violations. The enforcement policy should function in addition to the existing system of incentives for licensees. In the case of the NRC the existing system of incentives overwhelms any NRC enforcement action. These incentives include maintaining the capacity of the utility, the possibility of property damage, liability to others, the bond rating, and a licensee's overall reputation. The only real need for the enforcement policy is to fill in the gaps where this system doesn't work. The agency should aim at the areas where the existing system of incentives is not inadequate. One way to get at this is to look at the pattern of violations. This may indicate that the incentives are not working in these areas.

In figuring out what sanctions to impose the agency ought to analyze them in relationship to the size of existing incentives and use enforcement sanctions to close the gap. This is difficult to do in practice at the NRC because there is no good information on where the incentives are weak, but the existing policy seems to attempt to do this. The policy use severity levels based on the potential societal cost of the violation. The supplements appear to be sensibly set up on these grounds. Theoretically a civil penalty should be based on the set of factors developed to indicate whether the system of incentives is working well or not. If there is a bad history of the other incentives not working, one should escalate the penalty. If it's a self identified violation there seems to be a predisposition by the licensee to comply. The existing incentive system is working so one would mitigate the penalty. The NRC policy factors which are used seem to make sense in this regard. In theory there is no reason to treat a severity level I violation any differently. The mitigation factors and escalation factors should apply to such a violation as well. The basis for treating them differently seems to be more political than the result of a theoretical problem.

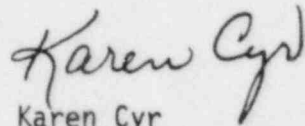
The penalty levels seem to be about right. The agency ought to be willing to go very high in severe reactor cases by going to a per day basis. The focus of penalties ought to be to send the right signal about the consequences of violations. Ability to pay should be used as an afterthought. The concept of economic incentives for licensees to violate requirements is difficult to analyze for NRC licensees. It's hard to figure out what are the costs of preventing a violation. It's not a simple case as with EPA permittees of the cost of a piece of equipment. Because this incentive is so hard to calculate, one can argue that civil penalties should be saved for the severe violations. The only positive incentive is the use of mitigation and so it seems plausible to increase mitigation for severity level I violations. Mr. Diver's inclination is not to punish individuals. This question depends a lot on how much authority is given to a particular individual. In order to punish individuals the NRC has to get into the business of deciding how much authority an individual has to have to be punishable and this could lead the agency into the business of managing industry. There are also very difficult problems with proof. One would hope utilities would find out who is responsible and take actions. Utilities are in the best position to allocate the blame. If there is a question of the fitness of a person to operate a facility, i.e., there is a real question of protecting the public health and safety, one is looking at a question of giving out suspensions not just punishing by civil penalties.

The Committee members briefly discussed Mr. Diver's outline and there was general agreement with his approach.

Following the discussions Mr. Wilkinson asked that each of the committee members draft up their sections of the report and provide them to the other members as soon as possible. He also asked the members to comment on the written report already provided by Dr. Parris before the next meeting.



Mr. Wilkinson agreed to write an executive summary for the report. The meeting was adjourned at approximately 4:30 p.m.

A handwritten signature in cursive script that reads "Karen Cyr".

Karen Cyr  
NRC Staff Liaison

July 22, 1985