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NUCLEAR ENERGY INSTITUTE

62FR 5494
Feb. 5, 1997

April 7, 1997

RECEIVED
1997 APR -9 AM 9:00
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VICE PRESIDENT &
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Mr. David L. Meyer
Chief, Rules Review and Directives Branch
Office of Administration
Mail Stop T-6D59
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

SUBJECT: NRC Enforcement Policy; 62 Fed. Reg. 5494 (February 5, 1997)

Dear Mr. Meyer:

On behalf of the nuclear energy industry, the Nuclear Energy Institute (NEI)¹ hereby submits comments on the revised NRC Enforcement Policy and related processes set out in NUREG 1600, "General Statement of Policy and Procedure for NRC Enforcement Actions."

We appreciate the NRC's institution of a trial period during which the agency, industry and members of the public have had an opportunity to evaluate whether the revisions to and the implementation of the revised Policy provide a sound regulatory framework. Providing those most affected by a given government policy and/or action with the ability to test its benefits and limitations, and then adjusting the policy based upon credible, real time experiences is a commendable example of responsible and responsive government. We recommend that this kind of "test and revise" approach be incorporated into other aspects of NRC regulation.

From our review of the revised Enforcement Policy we have concluded that NUREG-1600 represents some improvements over the previous enforcement process. In particular, the civil penalty assessment process is substantially more predictable.

The improvements in NUREG-1600 notwithstanding, there a number of areas where the enforcement process still can be made more effective. Such adjustments will address a number of pressing industry concerns. Section I of our comments identifies specific areas that continue to be problematic. This section is intended to

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including regulatory aspects of generic operational and technical issues. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, materials licensees, and other organizations and individuals involved in the nuclear energy industry.



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April 7, 1997

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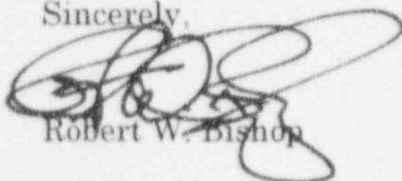
advance the agency's understanding of the difficult enforcement issues licensees have continued to confront over the past eighteen months. In this section we also recommend changes we believe are necessary to address those issues and to make the process more effective in achieving the NRC's overarching regulatory goal of ensuring adequate protection of public health and safety. These recommendations include modifying the criteria for awarding credit for good performance to appropriately account for nuclear plant organizational structure, revising the civil penalty assessment model to encourage self-identification and corrective action, clarifying the standards for corrective action credit, sharpening the regulatory message, changing the current practice of issuing multiple public communications regarding enforcement actions, and imposing measures to ensure that the enforcement process is not used to create new or additional regulatory requirements.

The recommended changes outlined above will address our immediate concerns with the revised Enforcement Policy. They will not rectify the broader policy issues we believe are attendant to the NRC's overall approach to enforcement. While we recognize that it is not practical to expect the NRC to quickly modify the enforcement process in fundamental ways, we believe that the NRC should give serious consideration to making fundamental changes. Briefly stated, those changes would seek to more closely focus the enforcement process on safety, avoid the current disproportionate emphasis on deterrence, provide clear and positive incentives to licensees to identify and correct non-compliances, and eliminate the use of enforcement as a substitute for other regulatory mechanisms.

We believe that fundamentally reorienting the Enforcement Policy will enhance its effectiveness as a regulatory mechanism to ensure that violations are corrected in a timely and technically justifiable manner. A more effective and efficient enforcement process should, in the long run, result in improved plant operation and greater public confidence in the regulator and the industry. Further, fundamentally modifying the NRC's approach to enforcement, along the lines we suggest, is necessary to produce a process that is fair, predictable and easily understood by licensees, NRC staff and the public.

NEI would be pleased to discuss with NRC staff the industry's views on the current enforcement process and ways to improve it.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert W. Bishop", with a large, stylized flourish extending from the end of the signature.

Enclosure

**COMMENTS BY THE NUCLEAR INDUSTRY
ON REVISIONS TO
THE NRC ENFORCEMENT POLICY (NUREG-1600)**

I. Recommended Changes to Improve the Current Enforcement Policy

NUREG-1600 represents a significant improvement in making the civil penalty assessment process more predictable. There are, however, several other areas where relatively limited changes in the Policy are likely to produce immediate and sound results. The following recommendations offer opportunities for NRC to (1) shift the emphasis of enforcement to achieve a more effective balance between encouraging good performance and deterring willful violations, (2) make more straight-forward the implementation of the current incentives for good safety performance, self-identification and corrective action, and (3) make the Policy more effective and efficient in obtaining these objectives.

A. The NRC Enforcement Policy Should Recognize Sustained Good Safety Performance

NUREG-1600 permits the NRC to consider four "decisional points" in the civil penalty assessment process. The first is "whether the licensee has had any previous escalated enforcement action (regardless of the activity area) during the past 2 years or past 2 inspections, whichever is longer." The inclusion of this factor obviously was intended to reward licensees for sustained good safety performance. Conversely, the identification of problems in the two-year time period was intended to highlight specific areas of concern necessitating greater attention. In practice, however, this factor has not served its intended purpose because of its overly broad sweep, including problems in any functional area.

The objective of awarding credit for good performance can be better achieved by modifying the criteria in the civil penalty assessment process to exempt only prior, non-willful escalated enforcement actions in the same functional area. Reactor licensees are complex, multi-discipline organizations with each functional area or other organizational division working together to meet the common objective of safe, efficient nuclear plant operation. The NRC licensing process even requires that licensees maintain certain separate functional groups (e.g., operations, quality assurance and emergency planning). NRC assessments, including the Systematic Assessment of Licensee Performance process, review functional areas separately. The practical need and regulatory demand for the organizational structure maintained by licensees also should be recognized in the enforcement program.

In a compliance-focused regulatory regime, where there are so many prescriptive regulatory requirements, a substantial portion of which are administrative in

nature, non-compliances are bound to occur. Thus, the effect of setting the scope of past violations so wide, together with the complexity of nuclear plant operations and the voluminous and detailed regulatory requirements, make it a near certainty that credit will be withheld because of a past violation. This stands in contrast to NRC's safety data which shows sustained excellent industry safety performance, regardless of the fact that most licensees receive an occasional violation in a two-year period. Despite the overall sustained good performance of most licensees, the plant-wide reach of this factor prevents the enforcement process from recognizing that good performance.

Credit for good safety performance should not be withheld based on the occurrence of any violation in the past two years. By focusing the exclusion for previous violations on those within the same functional area, the enforcement process would recognize the functional diversity inherent in the other aspects of NRC's regulatory program, the pervasive nature of NRC regulation, and the lack of nexus between an occasional, isolated non-compliance and a licensee's sustained good safety performance.

B. The NRC Enforcement Policy Should Encourage Self-Identification and Corrective Action

The current civil penalty assessment process attempts to promote licensee initiative by giving credit for self-identification and corrective action. However, the Enforcement Policy's current construct seeks to encourage licensees to self-identify and initiate corrective action by punishing non-achievement of those objectives, rather than by rewarding the desired behavior. That is, it treats withholding extraordinary punishment as an incentive. The Policy would more effectively achieve the goals of encouraging licensees to self-identify problems and correct them by providing real incentives.

We recommend that the NRC reduce civil penalty outcomes in the revised civil penalty assessment formula so that meaningful credit is awarded for self-identification or corrective action -- rather than simply withholding escalated penalties. Where the licensee self-identifies a violation, takes corrective action and, if appropriate, reports the problem, no civil penalty should issue. The revised civil penalty assessment process produces no civil penalty in that circumstance. We believe that this is consistent with the enforcement approach used of the Federal Aviation Administration, which has responsibilities similar to those of the NRC for public health and safety.

Beyond the one example where both the self-identification and corrective actions are satisfied, however, the current civil penalty assessment process fails to provide positive incentives for achievement of either objective individually. The current process awards a full base-amount civil penalty if either objective is unsatisfied. Thus, the possible results under the current process are 100% base civil penalty for

not meeting one objective (self-identification or corrective action), or a 200% base civil penalty (base + 100% escalation) if neither objective is satisfied.

Under the approach we recommend, if the licensee achieves either objective (self-identification or corrective action), it should receive a 50% reduction in the civil penalty. If both results are achieved, no civil penalty should issue. But, if the licensee fails to achieve both objectives, it receives the full base penalty -- 100%. As such, NRC offers a positive incentive by crediting achievement of the desired objectives. Escalating civil penalties beyond 100% of the base amount should be reserved for truly egregious violations where a deterrent is warranted (e.g., willful violations).

C. The NRC Enforcement Policy Should Clarify the Standards for Corrective Action Credit

NRC should clarify the standard for corrective action credit in the civil penalty assessment process. What constitutes "prompt and comprehensive" corrective action in the current policy is ill-defined, subjective and detracts from predictable implementation of the process.

Although the current Policy seeks to encourage licensees to take corrective actions, because of the lack of clarity in the standard for crediting corrective action, credit often is not given. The current criterion awards credit if the licensee's corrective actions satisfy a subjective standard, highly dependent on the circumstances at issue, and if the corrective action is deemed sufficient by the NRC. This frequently means that licensee corrective actions must go well beyond those necessary to address the symptoms and root causes of the specific matter for which enforcement action is being taken. The NRC enforcement process should not be used to force licensees to take actions beyond the applicable regulatory requirements. The Enforcement Policy should give credit for those corrective actions that, when implemented, restore regulatory compliance.

D. The NRC Should Sharpen the Regulatory Message Sent Through Enforcement Action

Although the revised civil penalty assessment process has improved the predictability of civil penalty outcomes in many circumstances, it also has resulted in civil penalties that are not proportionate to the regulatory message the agency intends. The civil penalty amount is calculated in a predictable way but does not reflect the safety significance of the violation. As a result, we have seen a greater tendency to resort to the considerations in Section VII of the Enforcement Policy to send an appropriate regulatory message.

The examples in Section VII. B. were crafted well before the revision to the civil penalty assessment process and for another purpose. At that time, mitigation factors were available in the civil penalty assessment processes. The revised penalty assessment process lacks an effective mechanism for mitigation to sharpen the regulatory message. The Section VII. B. examples are not well suited to more general use to which they have been put. Because the Section VII. B. examples were developed for another reason, NRC now should refine them. Improvements would include permitting civil penalty mitigation where a preponderance of the factors in the specific examples are present. Satisfaction of each of a long list of factors inherently skews the outcome so that mitigation is unlikely. Additionally, the definition of a willful violation varies from example to example.

We also recommend that the factors be re-evaluated for consistency with the objectives of the Enforcement Policy. Of particular concern, for example, is that mitigation for a violation during an extended shutdown is not available unless NRC concurrence is necessary for plant restart. This requirement furthers no legitimate objective of the Enforcement Policy.

E. The NRC Should Issue Public Communications That Fairly Put Enforcement Actions Into Context

The NRC has an obligation to inform the public in an accurate and meaningful way when it reports on matters of public interest. That obligation includes a responsibility to inform without unnecessarily alarming the public. In order to satisfy its responsibilities, NRC should have as complete an understanding of facts and circumstances of an alleged non-compliance as possible before issuing a press release. This means issuing a release only at the end of the enforcement process.

The NRC has specifically designed a comprehensive process to gather this information before taking enforcement action. If the agency lacks sufficient information to take final action, it also lacks sufficient information to responsibly inform the public. Indeed, proposed enforcement actions have been rescinded as a result of the information gathering process.

NRC should issue press releases in connection with enforcement actions only after final agency determination of the appropriate action. Multiple press releases in the course of the enforcement process do not further the objectives of the Enforcement Policy and erode public confidence in the regulatory process. Press releases issued at the end of the enforcement process should also carefully put the matter into context with respect to the safety significance of the violation.

G. NRC Enforcement Actions Should Be Consistent With Existing Regulatory Requirements

Before proposing escalated enforcement actions, NRC should evaluate whether the licensee's actions were based on a reasonable interpretation of applicable requirements. In some cases, NRC enforcement actions seem to be based upon new interpretations of regulatory requirements, not communicated to the licensee. Recent enforcement actions on FSAR design-basis issues, Section 50.59 implementation and the maintenance rule suggest a need for improvement in NRC management reviews of cited violations. These reviews should assure that the NRC does not create new regulatory requirements through the enforcement process nor penalize licensees for violations based on previously unannounced interpretations. Proper use of the NRC's rulemaking and licensing processes better accomplishes informed decision-making on technical issues and permits public participation in the process.

In sum, NRC management should guard against the informal creation of new requirements through the inspection and enforcement process. A routine, pre-issuance, NRC management-level review (for example, along the lines of a 10 CFR 50.109 review) would seem to be an effective way to address this problem.

II. Considerations for Changes to NRC's Overall Approach to Enforcement

A. Overview

The NRC enforcement process remains in need of both simplification and fundamental reorientation. The overriding goals of any changes made to the process should be to ensure that enforcement is fair, predictable and understandable, and that it serves the NRC's mission of protecting the public health and safety.

A core principle of the revised enforcement process should be to encourage voluntary compliance and, if problems are detected, corrective actions. Adoption of this core principle would fundamentally refocus the enforcement process on safety. As a result, the NRC's inspection and investigation resources would be redirected to better support the agency's mission. Enforcement resources should be expended only on violations that are safety significant, deliberate, or where a programmatic problem has been identified, based upon clear, objective standards. Reorienting the enforcement process away from issuing large numbers of violations for relatively minor non-compliances with little or no safety significance is a fundamentally different approach than that now used. It is critical to attaining the public policy benefits derived from applying the Principles of Good Regulation.

The effect of reorienting the enforcement process as we suggest would be that the vast majority of present violations would not be pursued through enforcement. For example, minor violations could be addressed by relatively informal means. These cases usually involve isolated incidents, deficiencies in specific program elements, personnel errors and non-compliances with procedures having little or no impact on safety, overall performance, or programmatic compliance. For regulatory purposes, these matters could be closed out by using its established system for resolving issues. This approach would significantly simplify the inspection and enforcement process now applied to minor violations that have been identified and corrected. It would also eliminate a large burden imposed on industry members and the regulator. Neither would have to divert resources to participate in enforcement actions for items that are corrected or in the process of being corrected, and are not safety significant.

B. The NRC Enforcement Process Should Focus on Matters That Are Safety Significant

The purpose of the NRC's enforcement program is and should be to support the agency's overall responsibility to ensure that public health and safety are protected. As such, the enforcement program should focus on matters that are important to overall plant safety and safe plant operation.

The Enforcement Policy and its implementation necessarily reflect the governing regulatory philosophy of the agency. In fact, NRC officials have, in recent months, suggested that one agency objective is to merge the thrust of its licensing and enforcement activities. To the extent that prevailing agency philosophy places increased emphasis on compliance, enforcement and inspection inevitably follow the same pattern. Enforcement and inspection activities that focus on assuring verbatim compliance tend to relegate considerations of relative safety significance to a secondary status. Sound safety judgment tends to be displaced by an emphasis on meticulous bookkeeping. In these circumstances, licensees tend to be driven toward emphasizing detailed compliance while inspectors are driven to assuring that procedural details match licensing documents, without regard to any safety significance.

This regulatory philosophy leads, almost inevitably, to a misallocation of resources on the part of both the agency and the licensee. NRC's staff must, as a matter of agency priority, apply an increased portion of its technical resources to "compliance checking" and away from making informed safety judgments. The licensee must respond in kind, devoting greater emphasis to its compliance "report card" and less to the type of safety-driven attitude that the NRC historically has encouraged. The long-term effect of undue emphasis on compliance rather than safety, in our view, is potentially to diminish safety. Therefore, enforcement that does not reflect risk-informed judgment is not consistent with the responsibility entrusted to the NRC to assure public health and safety.

These comments should not be interpreted as derogating the importance of compliance. Compliance is an element, but not the equivalent, of safety. However, if pursued solely for its own sake, it may run counter to the interests of safety. Because enforcement is so inextricably intertwined with basic regulatory philosophy, we urge the Commission to take into account the fundamental direction in which its regulatory philosophy appears to be headed in reconsidering the Enforcement Policy in its totality.

Enforcement can and should be more effectively linked to safety. NRC should adopt an approach that does not dictate that enforcement action is taken simply because a non-compliance is found. Rather, if the non-compliance found is one that even the NRC concedes does not represent a colorable risk to public health and safety, no enforcement action should be taken. For example, a violation of a documentation or reporting requirement where the impact on safety is, at most, extremely remote, should not be subject to any enforcement action. As we noted in Section I. A., given the complexity of regulatory requirements, even the most careful licensee is likely to be responsible for a technical violation on occasion. For violations with little or no safety consequence, where timely and corrective action has been implemented, subsequent enforcement action only diverts licensee resources from other, more potentially safety significant activities.

In our view, non-compliances quickly get the attention of the licensee regardless of whether enforcement action is proposed or taken. In fact, substantial incentives entirely separate from the enforcement process more effectively motivate licensees to identify problems and fix them, improve safety overall and comply with the regulations. (See Section II.C.).

It may be appropriate for the NRC to impose enforcement sanctions in those relatively rare cases where a licensee was or should have been aware of a potential safety problem and did not timely identify, report and/or correct it. Similarly, enforcement action may be appropriate for non-compliances of obvious safety significance or if there is an intentional violation. By reserving escalated enforcement for those kinds of cases, the NRC would send a clear signal to the licensee -- a violation then would mean an important issue exists, a message that now is diluted when violators are given routinely for matters of no real safety significance.

C. The Enforcement Process Should Not Disproportionately Emphasize Deterrence

The purpose of the inspection and enforcement program should be to identify and promote correction of non-compliances -- not to take punitive action after the licensee has addressed the problem. The industry has long maintained that the enforcement process disproportionately emphasizes deterrence, despite our

contention that the threat of an enforcement action has little to do with licensee compliance in any given circumstance (other than a willful violation).

We have repeatedly stated and continue to propound that licensees comply because they take their responsibility to operate safely as a paramount objective. The industry's overall continuing improvement in safety performance confirms this principle.

Other incentives motivate licensee compliance without regard to the potential for enforcement action. As has been previously noted in industry comments on this issue, it is simply good business to operate nuclear power plants safely. Plants that operate safely and reliably over the long term are more likely to be financially profitable.

Also, substantiating the NRC's confidence in the licensee's ability to safely operate a plant is a very strong motivator. Maintaining a licensee's overall good regulatory standing serves as strong incentive both to root out problems and to effectively correct them, and is an influence wholly apart from any deterrent effect of the enforcement program.

Perhaps most important, in an industry where willful violations are extremely rare, the deterrent effect of the NRC's enforcement program has little impact, if any, on actions taken by a licensee performing a particular task. We note that there have been recent cases where a licensee has followed, for example, a guidance document previously endorsed by the NRC and nevertheless was subjected to an enforcement action, based upon a staff interpretation different than that understood by the licensee at the time the action was taken. Under that circumstance, because the licensee deliberately took the steps it did in an attempt to comply with the guidance, no deterrent effect is served by any enforcement action taken. It also is likely that future actions of licensees would not be different, but also would be based upon a good faith reading of the given regulatory document unless the staff clearly identified in advance a different interpretation.

D. The Enforcement Process Should Provide Positive Incentives to Identify and Correct Non-Compliances

The Enforcement Policy should emphasize the benefits of licensee action to identify, report (if required) and correct non-compliances. The credit provided for these actions should not be voided by otherwise punitive aspects of the enforcement process. One way to implement a positive approach is to include in the enforcement process a refutable presumption that penalties will not be issued for violations identified, reported and promptly corrected by the licensee. This presumption should even include safety significant violations, so long as the licensee properly addresses the non-compliance once it is identified. This approach would permit licensees to focus their attention on safe plant operation immediately upon

identifying a violation rather than having to divert important resources to address the regulatory process involved when enforcement action is proposed.

This fundamental reorientation of the enforcement process would result in enforcement action for intentional violations, an NRC-identified failure of a licensee to meet regulatory requirements, if a licensee failed to take correct actions that it identified, or if a licensee did not implement corrective actions in a reasonably timely manner. Further, civil penalties would be imposed only if specific, objective factors were found to apply. Consideration should be given to, for example, criteria such as whether there is (1) an event or violation with actual safety consequences; (2) an event or violation with only potential consequences, but where that potential is realistic and the consequences severe, based on quantitative measurement, such as a probabilistic safety assessment; or (3) a willful violation.

E. The Enforcement Process Should be Fair, Stable, Easily Understood and Based Upon Clearly Identified Principles of Good Regulation

NRC should exercise its authority to address programmatic concerns without intruding on licensee management responsibility. Choosing and implementing corrective actions to address a particular non-compliance should be within the sole discretion of licensee management. Obviously, these corrective measures must be designed to not only address the non-compliance but also to preclude its recurrence. The recurrence of a safety significant violation should subject a licensee to significantly more severe regulatory action if the cause is that corrective actions were not effective.

As a matter of good regulation, enforcement should not be used as a substitute for other regulatory mechanisms. The enforcement process may not be used as an informal means (not subjected to the procedural requirements of the Administrative Procedure Act or the backfit rule) to amend or create new regulatory standards. In particular, where weaknesses are identified during an inspection, for example, and there is no regulatory requirement to upgrade a program or take other action, a licensee is not legally required to take such action despite an NRC "suggestion" to do so. In practice, however, licensees feel compelled to address NRC overtures regarding steps that should be taken to obtain general improvements in performance despite the lack of a legal requirement undergirding the regulator's "suggestion." Moreover, if in the course of a technical review NRC staff determines that it should adopt an approach or interpretation different than that understood to exist by licensees when they took the particular action, enforcement action should not be taken. General principles of law and the dictates of fundamental fairness demand that licensees have notice of the standards to which they will be held. Consideration should be given to taking enforcement action only when the licensee has had adequate notice of NRC's changed or new interpretation and has nevertheless failed to correct the non-compliance or deficiency at issue.