



NUCLEAR ENERGY INSTITUTE

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January 18, 2000

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VICE PRESIDENT &
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AD

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DOCKET NUMBER
PETITION RULE PRM 2-12
(64FR59669)

SUBJECT: Petition for Rulemaking – Enforcement Process for Alleged Violations
of the Deliberate Misconduct and Employee Protection Rules
(64 Fed. Reg. 59669; November 3, 1999)

Dear Ms. Vietti-Cook:

On behalf of the nuclear energy industry, the Nuclear Energy Institute¹ is pleased to submit comments on the petition for rulemaking filed by Michael Stein, published in the Federal Register November 3, 1999 (64 Fed. Reg. 59669). The petition requests that the NRC extend its procedures to allow for a hearing on a Notice of Violation (NOV) issued to an individual for a violation of the employee protection requirements (10 CFR 50.7; 10 CFR 50.5).²

In sum, the nuclear energy industry supports the revisions to the NRC's regulations recommended in the petition, but suggests that the NRC facilitate a fuller discussion of the proposal prior to making a decision on the petition.³ The industry would be pleased to participate in such discussions or a stakeholder meeting held by the NRC. The industry also recommends that the NRC use this rulemaking, and

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry, including the 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, nuclear materials licensees, and other organizations and individuals involved in the nuclear energy industry.

² An opportunity for a hearing already exists for individuals issued orders and civil penalties under 10 C.F.R. 2.202 and 2.205.

³ For example, the industry recommends that the rulemaking be expanded to provide the same opportunity for a hearing to individuals and licensees issued a Notice of Violation based upon 10 CFR 50.5, regardless of whether the underlying regulation claimed to be violated is 10 CFR 50.7 or some other 10 CFR 50.7 and/or rule).

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stakeholder interactions on this topic, to reconsider additional administrative safeguards that could be provided to individuals and which would occur earlier in the process.⁴ In particular, the industry believes there are compelling reasons to revise the NRC's current policy not to release Office of Investigations reports prior to the conference. We have stated the industry's views on this subject in previous communications with the NRC.⁵

Turning first to the petition, adding an opportunity for a hearing would be consistent with the general dictates of due process and, as a practical matter, would provide an important check on NRC enforcement action. Given the gravity of proposed enforcement action against an individual, the opportunity for the accused individual to present his or her perspective to a neutral decision maker would seem to be a minimum procedural safeguard the NRC should provide in these circumstances. The impact on an individual of a NOV citing a willful violation of an NRC regulation, even in the absence of a civil monetary penalty or an action-forcing order, cannot be overstated. It unquestionably puts the individual's career in the nuclear industry at risk, markedly affects his or her status and reputation within his or her company and even within the local community and, in some cases, makes it difficult to obtain future employment.

Providing the individual with an opportunity for a hearing after a predecisional enforcement conference is appropriate because it serves both the individual's and the NRC's interest to have such severe enforcement action reviewed by an independent body. (Presumably, the petitioner envisions a hearing before an Atomic Safety and Licensing Board or a presiding officer chosen from the Board Panel). The hearing would allow a review by administrative judges who routinely make decisions on issues of evidence, witness credibility, and law. It would provide the agency with a means to ensure that, before severe governmental action becomes final, the individual has been offered a full opportunity to air his or her perspective regarding the facts and controlling legal principles.

Although the Enforcement Policy states a predecisional enforcement 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,"⁶ in those few

⁴ The additional administrative safeguards suggested herein do not require rulemaking.

⁵ Letter from Robert W. Bishop to James Lieberman, dated February 6, 1998.

⁶ 64 Fed. Reg. 61142, 61148 (Nov. 9, 1999)

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cases in which a conference is not held, it is even more imperative that the NRC provide an opportunity for hearing. Similarly, even where enforcement conferences are held, the facts and positions of each side are not fully aired or subject to cross examination, and in cases where the individual does not prevail in the conference, he or she now simply has no meaningful remedy in response to the NOV.

Several aspects related to implementation of the hearing opportunity have not been fully explained in the petition. For example, it is unclear whether the hearing as proposed in the petition is to be formal, with rights including cross examination and discovery. The industry believes that, as with any enforcement case, there should be an opportunity for a Subpart G, adjudicatory hearing before administrative judges.

Likewise, it is not clear from the petition when the hearing opportunity would be provided. Upon receipt of the NOV, or following a response to the NOV and the agency's imposition of the NOV? As the rule is proposed, it appears (in contrast to 10 C.F.R. 2.205) that the hearing opportunity would eliminate the need for an answer. The petitioner seems to have relied on procedures set out in 10 CFR 2.201, 2.202 and 2.205, but the differences have not been explained or justified. Moreover, the proposed regulation should be clarified to prevent conflicts -- such as a case where an NOV and a civil penalty are involved. The hearing opportunity should not arise at different times on the NOV and the order imposing a civil penalty. These issues are ripe for discussion among the petitioner, NRC and stakeholders to ensure that there is a common understanding of how the opportunity for hearing would be implemented.

As noted above, given that the objective of the instant rulemaking is to ensure individuals are provided adequate safeguards before the NRC imposes severe enforcement action, the rulemaking also should prompt reconsideration of additional administrative safeguards to individuals earlier in the investigation-enforcement process. For example, during the investigative stage, individuals should be fully informed when they are the target of an investigation and not merely a fact witness. Individual targets should be made more aware of alleged facts supporting an alleged violation and given an opportunity to provide additional clarifying information. And, if the investigation results in a substantiated claim, we continue to believe it is critical for the NRC to release OI reports *in advance* of the predecisional enforcement conference.

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Predecisional enforcement conferences are designed to permit the agency to obtain the following information:⁷

- a common understanding of the facts, root causes, and missed opportunities to identify the violation sooner,
- a common understanding of corrective actions,
- a common understanding of the significance of the issues and the need for lasting and effective corrective action.

In addition, NRC correspondence inviting licensees and individuals to predecisional enforcement conferences routinely describes the conference as an opportunity to point out any errors in the NRC's understanding of the apparent violation(s). Yet, the NRC routinely denies licensee and individual requests for copies of the relevant investigative report prior to the enforcement conference, despite some limited precedent for releasing this material after the NOV and before the required response.

The Enforcement Guidance Memorandum 99-007 permits the NRC staff to provide a mere summary of the facts that led the staff to conclude that a violation of a regulatory requirement may have occurred. The staff practice incorporated in EGM 99-007 does not adequately balance the agency's need to retain confidentiality during *the pendency of an investigation* with the accused individual's need to provide information relevant to the accusations *prior to an enforcement decision being made*.

We strongly believe that withholding OI reports does not further the stated fact-finding purpose of a predecisional enforcement conference. In our view, it has the opposite effect. The result is a less developed record upon which the NRC will base its decision. Issuing a mere summary does not provide the accused individual with a meaningful opportunity to address or refute the allegations contained in the report. Without the opportunity to review the investigative report, licensees and individuals are unable to point out errors in the NRC's understanding of the apparent violation or reach a common understanding of the facts. A clear record and sound decision making at the predecisional enforcement conference may

⁷ NUREG/BR-0195, NRC Enforcement Manual, Rev. 2, Section 5.3.

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eliminate the need for a hearing down the road, resulting in greater agency efficiency in the long run.

Fundamental fairness also mandates that individuals potentially facing civil and criminal sanctions be given notice of the allegations against them at the earliest reasonable point in the process. Denying a witness the opportunity to review the contents of the OI report prevents him or her from adequately preparing for the conference. The OI report presumably will contain OI's credibility assessments. It would seem axiomatic that the accused should have an opportunity not only to evaluate OI's credibility assessment, but also to provide a response to it. Further, factors not mentioned in the summary often are used to form the basis for the investigative finding and tentative enforcement decision. In that situation, even if a licensee or individual were to persuasively refute the known bases for the allegation(s), the NRC still might take enforcement action based on undisclosed information contained in the investigative report.

The failure to release the OI report prior to the enforcement conference is particularly disturbing because the OI investigation does not provide the individual who is or becomes the focus of an OI investigation an opportunity to address that which is alleged by others and captured in OI's report. The result is the accused's perspective is neither captured in the OI report nor can the accused address the contents of the report prior to the enforcement conference because it is not released. The need to avoid this result is compelling because, as noted above, the consequences are likely to be very severe for an individual in the nuclear industry who is involved in a situation for which enforcement action is being considered.

The fact that the investigation has been completed by the time of the predecisional enforcement conference also would seem to strongly favor releasing the OI report to allow licensees and individuals to prepare adequately for the conference. When the conference takes place, the only remaining fact-finding is to obtain the licensee's or individual's view of the facts, which can be effective only if the accused has adequate notice of the bases for the charges.

Because a fair and timely enforcement process depends upon providing licensees and individuals a copy of investigative reports prior to the predecisional enforcement conference, the industry recommends that the NRC consider adding the following language (at the end of petitioner's suggested language) to the deliberate misconduct and employee protection rules:

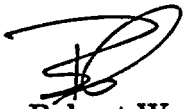
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In either case, when the alleged violation is based on a Report of Investigation issued by the NRC Office of Investigations (OI) or other investigative report relied on by the NRC, the individual charged with such a violation shall be provided a copy of the investigative report no later than fifteen business days prior to the time the individual must inform the NRC whether a written response or enforcement conference is requested.

In conclusion, we support the petition's request that the NRC provide an opportunity for hearing for individuals charged with violations of employee protection or deliberate misconduct regulations. We further request the NRC more fully consider the procedural details relevant to this petition. Finally, the industry also recommends that the NRC take this opportunity to consider implementing the additional procedural safeguards described herein. These additional procedural safeguards will help to ensure a fair, timely and meaningful opportunity for individuals to participate in the NRC investigation-enforcement process.

If you have questions regarding our views or would like to discuss them further, please contact me or Ellen Ginsberg, NEI Deputy General Counsel.

Sincerely,



Robert W. Bishop

c: David L. Meyer, Chief
Rules and Directives Branch, NRC