

POLICY ISSUE NOTATION VOTE

December 30, 2009

SECY-09-0190

FOR: The Commissioners

FROM: R. W. Borchardt
Executive Director for Operations

SUBJECT: MAJOR REVISION TO NRC ENFORCEMENT POLICY

PURPOSE:

To request Commission approval of a major revision to the U.S. Nuclear Regulatory Commission (NRC) Enforcement Policy (Enforcement Policy or Policy).

SUMMARY:

The NRC staff is proposing that the Commission revise its Enforcement Policy to more appropriately address the various areas that the NRC regulates, providing a framework that supports consistent implementation of the Enforcement Policy. The revised Policy corrects or removes outdated information and adds information addressing enforcement issues in areas that are not directly addressed in the current Policy. The revised Policy has also been reformatted to facilitate ease of use, including an expanded table of contents and the addition of a glossary of terms commonly used in the enforcement process.

BACKGROUND:

The Enforcement Policy contains the policy and basic procedures that the NRC uses to consider potential enforcement actions in response to apparent violations of NRC requirements. The primary purpose of the Enforcement Policy is to support the NRC's overall safety mission (i.e., to ensure adequate protection of public health and safety, promote the common defense and

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security, and protect the environment). The NRC first published the Enforcement Policy in the *Federal Register* (FR) on October 7, 1980 (46 FR 66754), as an interim policy. The Commission published a final version of the Policy on March 9, 1982 (47 FR 9987). The NRC modified the Enforcement Policy on a number of occasions to address changing requirements and additional experience, and it published a major revision of the Policy on June 30, 1995 (60 FR 34381).

The goal of the Policy is to support the NRC's safety and security mission by emphasizing the importance of compliance with regulatory requirements and by encouraging the prompt identification and prompt, comprehensive correction of violations. Revisions to the Policy have consistently reflected this commitment. For example, the NRC changed its inspection procedures in 1998 to address the Reactor Oversight Process (ROP) initiative. The Policy's increased use of risk insights to assess the significance of violations whenever possible reflects this change. Although it may result in the issuance of fewer notices of violation (NOVs) (because of a greater emphasis on the use of noncited violations), it has not reduced the agency's emphasis on the importance of compliance with NRC requirements. Another example involves the NRC's development of a pilot program in 2005 that focuses on the use of alternative dispute resolution (ADR) for certain kinds of enforcement cases. The NRC enforcement staff has used ADR to resolve reactor, fuel facility, and materials enforcement cases. Although the use of ADR in enforcement raises unique issues, it emphasizes creative, cooperative approaches to handling conflicts.

The NRC staff is again proposing a major revision to the Enforcement Policy. As discussed above, since first publishing it in 1980, the NRC has updated sections of the Policy and included additional ones. Terms used under traditional enforcement are now also associated with the significance determination process performed under the ROP; therefore, the use of these terms should be clarified. In addition, the violation examples in the Enforcement Policy as it currently exists do not directly address certain areas, such as enforcement issues associated with combined licenses for the proposed new reactors, the construction phase of proposed fuel facilities, and new requirements related to safeguards and security.

In order to address these additional areas, the NRC staff proposes revising the Enforcement Policy, in part, so that the policy statement closely parallels the actual enforcement process. The NRC's enforcement process has three basic steps: (1) violations must be identified, (2) the NRC must assess the significance or severity of the violation, and (3) the NRC must disposition the violation. Throughout the enforcement process, an organization or individual subject to an NRC enforcement action typically has multiple opportunities to provide input.

The staff intends that this revised Policy closely reflect the Commission's position on the enforcement of its requirements. However, the Enforcement Policy is not intended to discuss every aspect of enforcement. It is more appropriate for specific implementation guidance to be located in the NRC Enforcement Manual or other program-specific implementing procedures (e.g., the ROP). The revised Policy has also been reformatted to facilitate ease of use, including an expanded table of contents and the addition of a glossary of terms commonly used in the enforcement process.

The staff is aware that enforcement actions deliver regulatory messages. Based on this tenet, the goals of this proposed revision are to ensure that the Enforcement Policy (1) continues to reflect the Commission's focus on safety and security (e.g., the need for licensees to identify and correct violations, to address root causes, and to be responsive to initial opportunities to identify and prevent violations), (2) appropriately addresses the various subject areas that the NRC regulates, (3) provides a framework that supports consistent implementation, recognizing that each enforcement action is dependent on the specific circumstances of the case, and (4) deters noncompliance by emphasizing the importance of compliance with NRC requirements.

DISCUSSION:

Public Involvement in the Policy Revision Process

Historically, the NRC has provided limited opportunity for public involvement in Enforcement Policy revisions. As indicated below, the staff provided several opportunities for the public to provide comments to this major revision of the Enforcement Policy.

A notice published on January 25, 2007 (72 FR 3429), announced that the NRC was undertaking a major revision of its Enforcement Policy to clarify the use of terms and to update the Policy, thus removing outdated information and adding information to address enforcement issues in areas that the current Policy does not directly address.

On September 15, 2008, the NRC published a notice of availability and request for comments on its draft revised Enforcement Policy (73 FR 53286). A corrected revised Enforcement Policy was published on October 16, 2008 (73 FR 61442). The public comment period for the revised Enforcement Policy ended on November 14, 2008. The notice solicited comments from interested parties, including public interest groups, States, members of the public, and the regulated industry (i.e., reactor and materials licensees, vendors, and contractors).

In response to the 2008 notice of availability, the staff received more than 100 comments on the proposed revision to the Enforcement Policy. Several commented that the NRC had removed too much detail from the Policy and were concerned that NRC would relocate this information to the NRC Enforcement Manual or to another staff guidance document or procedure on which the public normally is not given the opportunity to comment. The staff agreed with this comment and subsequently reinserted much of the detail that it had previously removed. Summaries of the public comments on the Policy and staff's responses to those comments appear under Agencywide Documents Access and Management System (ADAMS) Accession No. ML091830260.

Following the 2008 public comment period, the staff, based in part on the comments received from external stakeholders, reconsidered its original plan to provide abbreviated violation examples (i.e., in Section 6.0) in the revised Policy and to provide additional violation examples that contain more detail in the NRC Enforcement Manual. The staff ultimately decided to continue the practice of the current Policy of providing violation supplements only in the Enforcement Policy. The staff notes that the violation examples in the proposed revised Policy are intended to cover a broad range of circumstances in each of the four severity levels in 14 activity areas and that, like the current Policy, the violation examples are neither exhaustive nor controlling for severity-level determinations.

The revised violation examples reflect the staff's experience with a wide range of enforcement actions and with changes in regulations (i.e., new or amended regulations, such as Title 10 of the *Code of Federal Regulations* (10 CFR) 50.26, "Fitness for Duty Programs") since the last major revision of the Policy in 1995. Many of the violation examples in the revised Policy are unchanged from those in the current Policy. In some cases, the staff determined that the violation examples in the current Policy merely needed to be updated or clarified. In other cases, there were no comparable violation examples in the current Policy to address the present enforcement or regulatory environment; the staff therefore developed new violation examples to address those issues. For the reasons stated above, the violation examples that the staff proposed during the 2008 public comment period were, in many cases, revised following that public comment period.

The staff provided an additional public comment period (74 FR 27191; June 8, 2009) to make the public aware of substantial additional revisions to the violation examples and to solicit comments specifically on those examples. The public comment period on the revised violation examples ended July 8, 2009. External stakeholders provided a significant number of comments for the staff's consideration. Resolution of these comments from members of the public, and numerous other comments received from the NRC staff over a period of months, involved an extensive review process by the NRC staff, which has now culminated with this major revision to the Enforcement Policy. A summary of the public comments associated with the 2009 notice regarding the violation examples and the staff's responses to those comments is publicly available at the NRC's Electronic Reading Room and under ADAMS Accession No.ML092650309.

In addition to the above public comment periods announced in the *Federal Register*, the NRC Office of New Reactors (NRO) and the NRC Office of Nuclear Material Safety and Safeguards (NMSS) held public meetings to discuss specific aspects of the Policy and violation examples relevant to the programs over which they have oversight. Following those public meetings, NRO and NMSS provided their recommendations on the revised Policy to the Office of Enforcement for consideration.

The staff intends to provide another opportunity for public comments after this revised Enforcement Policy has been in effect for about 18 months.

Summary of Major Revisions to the Enforcement Policy

1. Revisions to the Table of Base Civil Penalties

Regulatory requirements have varying degrees of safety, security, or environmental significance. For that reason, the NRC imposes various base civil penalties depending on the specific circumstances. Section 8.0, Tables A and B, of the revised Enforcement Policy set forth the base civil penalties for various reactor, fuel cycle, material, and vendor programs. The NRC uses a graded approach in assessing civil penalties based on the severity level of the violation and on the class of licensee, vendor, or other person. Base civil penalties generally take into account the significance of a violation as the primary consideration, whereas the licensee's ability to pay is a secondary consideration. The NRC reviews each proposed civil penalty on its own merits and, after considering all relevant circumstances, may adjust the base civil penalties in Table A for Severity Level I, II, and III violations as reflected in Table B of the Enforcement Policy (i.e., 100 percent for Severity Level I violations, 80 percent for Severity Level II violations,

and 50 percent for Severity Level III violations). However, in no instance would a civil penalty for any one violation exceed the statutory limit which is presently capped at \$140,000 per day per violation. In consideration of the above, the staff proposes the following changes to the Table of Base Civil Penalties:

a. Geologic Repository for Spent Fuel and/or High-Level Waste Repository

The Table of Base Civil Penalties in the current Enforcement Policy has no provisions that address a geologic repository. Therefore, the staff is proposing to revise the civil penalty table in the revised Policy to include geologic repositories to ensure that, if the need arises, the NRC has the appropriate tools to take enforcement actions.

Based on the potential nuclear material inventory involved at a geologic repository and the corresponding safety consequences that could arise at the site (specifically to employees), the staff recommends the statutorily allowed maximum base civil penalty for a Severity Level I violation. In determining the base civil penalty that should be applied to a geologic repository, the staff also considered that the licensing criteria used in developing 10 CFR Part 60, "Disposal of High-Level Radioactive Wastes in Geologic Repositories," and 10 CFR Part 63, "Disposal of High-Level Radioactive Wastes in a Geologic Repository at Yucca Mountain, Nevada," were comparable to the criteria applied to reactors and spent fuel facilities. The staff also recommends including this information in Table A of the revised Policy under the generic heading "High-Level Waste Repository" to address the possibility of any future engineered underground disposal facilities used for the storage of HLW.

b. Uranium Enrichment Facilities

The current Enforcement Policy only provides a base civil penalty for gaseous diffusion plants and does not address other enrichment facilities such as gas centrifuge or laser enrichment facilities. The NRC staff has issued licenses for two gas centrifuge uranium enrichment facilities with enrichment levels of up to 5 weight percent uranium-235 (U-235) and 10 weight percent U-235 and licensed a pilot laser enrichment facility. Currently, the NRC staff is performing the licensing review for a third uranium enrichment facility with an enrichment level of 5 weight percent U-235. Therefore, the staff believes that it is appropriate to provide a base civil penalty for these types of facilities at this time.

In developing a base civil penalty for uranium enrichment facilities, the staff compared the radiological, chemical hazards of licensed materials, criticality and security hazards of these facilities with both gaseous diffusion plants (GDPs) and Category III fuel fabricators and, through an overall comparison, provided an appropriate base civil penalty. Both enrichment facilities and Category III fuel fabricators have Category III special nuclear material (i.e., these facilities are limited to enrichments of less than 20 percent of U-235 (special nuclear material of low strategic significance)). In addition, the radiological and chemical risks of gas centrifuge uranium enrichment facilities are considered more similar to Category III fuel fabricators than to the GDPs. Therefore, the necessary physical protection and material control and accounting requirement (based on the category of facility) for uranium enrichment facilities are similar to those required for Category III fuel fabricators. For these reasons, the staff believes that the base civil penalty for Severity Level I violations at uranium enrichment facilities in Table A should be established at \$35,000, the same as the amount already established for Category III fuel fabricators.

c. Uranium Conversion Facilities

The staff proposes to increase the base civil penalty for enforcement activities associated with uranium conversion facilities to \$70,000 from the current amount of \$14,000. Presently, the only operating uranium conversion plant in the United States is the Honeywell facility located in Metropolis, IL.

Currently, uranium conversion facilities are in the same base civil penalty category as test reactors and industrial radiographers with a base civil penalty amount of \$14,000. The staff compared the radiological, chemical hazards of licensed materials, criticality hazards of a conversion facility to similar hazards at GDPs and Category III fuel fabricators and concluded that the radiological and chemical hazards at uranium conversion facilities are similar in comparison to those of GDPs. However, the criticality risk present at a GDP and Category III fuel fabricators is not a major risk factor at a uranium conversion facility.

The staff also considered the security implications associated with the operation of uranium conversion facilities as compared to the operation of GDPs and to Category III fuel fabricators. That comparison indicates that the security and safeguards measures necessary at a uranium conversion facility are similar to or less than those of Category III fuel fabricators and GDPs. However, because of the large number of potential chemical hazards associated with licensed materials and certain radiological hazards, protection against potential criminal activities is required to protect worker and public health and safety.

In comparison, the overall radiological hazards and chemical hazards associated with licensed materials for uranium conversion facilities are much more significant than those of test reactors and industrial radiographers and Category III fuel fabricators but less than those of GDPs. For these reasons, the staff believes that the base civil penalty for violations at uranium conversion facilities in Table A should be established at \$70,000, which is the same amount established for fuel fabricators authorized to possess Category I or II quantities of special nuclear material.

2. Interim Enforcement Policy on the Use of Alternative Dispute Resolution

The Interim Enforcement Policy on the Use of Alternative Dispute Resolution (ADR) was established to set forth an interim Policy that the NRC would follow while undertaking a pilot program to test the use of ADR. Because the ADR pilot program has been successfully completed and the ADR program has since been fully implemented, the staff has revised the Policy statement on ADR to reflect this change.

3. Violation Examples

The violation examples have been reorganized and expanded from the 8 activity areas contained in the current Enforcement Policy to 14 activity areas in the revised Policy. These changes were made for clarification and ease of use; in other cases, the activity areas reflect changes made to NRC regulations. For example, the staff rewrote the facility construction violation examples to include licensees under 10 CFR Part 52, "Licenses, Certifications, and Approvals for Nuclear Power Plants," and fuel cycle facilities. Fuel cycle and materials operations were reorganized into separate activity areas. New activity areas were added for reactor and fuel facility security, materials security, information security, and fitness for duty.

4. Addition of a Glossary

The revised Policy contains a glossary listing many of the terms commonly used throughout the NRC enforcement process.

5. Revision to a Previous *Federal Register* Notice

The revised Enforcement Policy includes a proposed revision to a previous FR notice, "Base Civil Penalties for Loss, Abandonment, or Improper Transfer or Disposal of Sources; Policy Statement" (65 FR 79139; December 18, 2000). Specifically, the staff proposes replacing the term "sealed source or device" with the term "regulated material" both in the body of the revised Policy, in Section 2.3.4, and in the Table of Base Civil Penalties, Table A, category f. The staff deleted the term "sealed" because the NRC uses the same enforcement approach for both sealed and unsealed sources. The term "regulated material" captures present and future NRC-regulated material.

COMMITMENT:

Listed below is the action or activity committed to by the staff in this paper.

The staff intends to provide an opportunity for public comments after this revised Enforcement Policy has been in effect for about 18 months.

RECOMMENDATIONS:

The NRC staff recommends that the Commission take the following two actions:

- (1) Approve the revised Enforcement Policy (Enclosure 1) for publication in the FR.
- (2) Approve the revised Enforcement Policy *Federal Register* notice (Enclosure 2).

COORDINATION:

The Office of the General Counsel has no legal objection to the Enforcement Policy revision. The Office of the Chief Financial Officer reviewed this Commission paper for resource implications and has no objections.

/RA/ Martin Virgilio for

R. W. Borchardt
Executive Director
for Operations

Enclosures:

1. Revised Enforcement Policy
2. Draft *Federal Register* Notice

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ADAMS Package: **ML093200524**

WITS200800327/EDATS: SECY-2008-0529

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