

August 5, 2005

COMSECY-05-0033

MEMORANDUM TO: Chairman Diaz
Commissioner Merrifield
Commissioner Jaczko
Commissioner Lyons

FROM: Luis A. Reyes **/RA/**
Executive Director for Operations

SUBJECT: STAFF PLAN TO ADDRESS SUPPLEMENTAL STAFF
REQUIREMENTS MEMORANDUM (M050419A-SUPP) -
DISCUSSION OF ENFORCEMENT ISSUE

The purpose of this memorandum is to describe the staff's planned actions to address direction provided by the Commission in its supplemental staff requirements memorandum (SRM) M050419A-SUPP, dated June 14, 2005, and to seek Commission feedback on the staff's proposed approach to the subject SRM. The proposed changes were developed after evaluating the frequency of cases accepted by the Department of Justice (DOJ). The process described in this paper is proposed to replace all steps related to tracking of future enforcement cases outlined in the supplemental SRM. The staff will continue to resolve the outstanding enforcement actions discussed in SECY-05-0060 within five months of the SRM.

The central issue raised in the subject SRM is how the staff handles enforcement actions that are referred to and accepted by the DOJ. The 5-year statute of limitations period in 28 U.S.C. §2462 applies to violations for which the U.S. Nuclear Regulatory Commission (NRC) seeks to impose a sanction such as a civil penalty, issuance of an order to modify, suspend, or revoke a license or prohibit involvement in NRC licensed activity. The statute is an affirmative defense that may be asserted by a person against whom a sanction is proposed and is intended to prevent the prosecution of stale claims. Thus, absent special circumstances, the NRC must initiate the action associated with a violation no more than five years from the date the violation occurred.

Concerns regarding the timeliness requirements of the statute arise only infrequently, and have tended to be associated with matters investigated by the Office of Investigations (OI) which are referred to DOJ for further investigation and potential criminal prosecution by DOJ (including possible presentation before a grand jury) and, as a consequence, enforcement action by the NRC is deferred.

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Under the Memorandum of Understanding (MOU) with DOJ, if the NRC does not believe that public health and safety requires immediate enforcement action, it may (1) await the completion of DOJ's process, or (2) consult with DOJ about the proposed civil action, deferring enforcement until DOJ consents. Under either option, when the statute's period nears expiration, the NRC may proceed with enforcement after consulting with DOJ.

Currently, OI communicates with DOJ regarding each substantiated case prior to issuing its Report of Investigation and referring the case to the staff for review and action. Generally that process has worked well, with DOJ typically providing an oral declination within the 60-day goal expressed in the subject SRM. During the past five fiscal years, out of 244 cases referred to DOJ for prosecutorial review, DOJ has accepted only seven for criminal prosecution. When DOJ accepts a case, OI will typically issue its report to the staff informing them of DOJ's acceptance of the case for prosecution.

In order that all cases are pursued in an expeditious manner and the option of proceeding with a civil action is maintained, the staff will implement changes to the current process as highlighted below.

In conjunction with the Office of Information Services, Office of Enforcement (OE) and OI are developing a new, integrated database to support the existing investigation and enforcement program systems. Currently, a limited amount of information is shared between these systems. The new database, which is expected to be operational by the end of December 2005, will allow much greater sharing of information, including a direct link in the enforcement system to the statute of limitations data currently tracked by OI. When an enforcement action is opened, OE will monitor the statute through use of database reports. The use of routine database reports will allow OE to be more proactive in communicating with OI, and in turn DOJ. In the interim, OE will continue to obtain the information directly from OI and manually track the statute deadlines. OI will contact DOJ at least every 120 days for status once DOJ accepts a case for prosecution.

Once a case is within one year of the statute expiring, the staff will communicate the agency's intent to pursue civil enforcement action to DOJ and request consent to proceed. If DOJ requests the staff to continue deferral of civil action, the staff will develop a plan on a case-by-case basis and inform the Commission, no less than six months in advance of reaching the statute of limitations, of the plan of action. This may include proceeding with the civil action or seeking a waiver of the statute from the licensee (or other person against whom an action is to be proposed).

The staff recommends that waivers of the statute of limitations continue to be an option available to the staff when, after consultation with DOJ, and with the Commission's knowledge, it is necessary and in our interest to defer initiating an action. By delaying NRC action until completion of the DOJ formal judicial process, waivers potentially could save all affected parties substantial resources by avoiding further NRC investigation and implementation of the NRC's normal enforcement and adjudicatory process. Waivers have been utilized rarely by the staff and typically have been used to extend the review for a period of less than one year. The staff finds waivers to be beneficial, particularly in discrimination cases before the Department of Labor (DOL) where the NRC has not substantiated the case. Occasionally new information comes to light during the discovery and/or testimony phase of the DOL adjudicatory process that the staff uses when making its final enforcement decision. Issuing a waiver in these

instances preserves NRC civil penalty enforcement options until completion of the DOL formal judicial process. Because of their resource savings, infrequent use, and potential benefits, the staff concludes that waivers remain a viable option available in both DOJ and DOL proceedings.

The steps and enhancements described above will be documented in the Enforcement Manual and in OI's Investigations Procedures Manual. The above elements can be implemented without any revisions to the current MOU with DOJ. I am seeking Commission feedback on the above stated approach to assure that this meets the intent of the subject SRM.

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