

August 18, 2006

MEMORANDUM TO: Samuel J. Collins, Regional Administrator, Region I
William Travers, Regional Administrator, Region II
James L. Caldwell, Regional Administrator, Region III
Bruce Mallet, Regional Administrator, Region IV
James Dyer, Director, Office of Nuclear Reactor Regulation
Jack R. Strosnider, Director, Office of Nuclear Material Safety
and Safeguards
Roy Zimmerman, Director, Office of Nuclear Security and
Incident Response
Janet R. Schlueter, Director, Office of State and Tribal Programs

FROM: Michael R. Johnson, Director, Office of Enforcement /RA/

SUBJECT: ENFORCEMENT GUIDANCE MEMORANDUM – DISPOSITIONING
NON-WILLFUL 10 CFR 50.9 VIOLATIONS RELATED TO SAFETY
SYSTEM UNAVAILABILITY PERFORMANCE INDICATOR CHANGES

This enforcement guidance memorandum (EGM) provides guidance for the dispositioning of non-willful violations involving the failure of power reactor licensees to provide complete and accurate performance indicator (PI) data associated with U.S. Nuclear Regulatory Commission (NRC) Regulatory Issues Summary (RIS) 2006-07, Changes to the Safety System Unavailability Performance Indicators, (ML060170470) dated June 12, 2006.¹ This RIS informed addressees that beginning on April 1, 2006, the NRC replaced the safety system unavailability PIs with the mitigating systems performance index² (MSPI).

Although participation in this PI program is voluntary, 10 CFR 50.9, Completeness and Accuracy of Information, requires that information provided to the Commission by a licensee shall be complete and accurate in all material respects. This includes the voluntary submittal of historical MSPI information by licensees, and this information is considered material because the NRC uses it to assess licensee performance and to make decisions on regulatory action. The MSPI data, as with any other PI data, is used in conjunction with inspection findings for

¹ Willful violations are not subject to this EGM and should be processed in accordance with the Enforcement Policy.

² The mitigating systems performance index (MSPI) is a risk-informed performance indicator (PI) which reflects the composite averaged performance of important components and trains within a monitored system over a 12-quarter (3-year) period. Participating licensees will report an unavailability index number and an unreliability index number for each of the five monitored systems on a quarterly basis. The staff will combine these inputs to arrive at a total MSPI index value for the monitored system in terms of a change in core damage frequency (^aCDF_{index}), and that value will be displayed on the NRC Website. If the value exceeds a performance threshold, then the appropriate PI color will be indicated. The performance thresholds are risk-based, and the threshold values are the same for all systems and for all licensees. They are set at >1E-6 ^aCDF_{index} (White), >1E-5 ^aCDF_{index} (Yellow), and >1E-4 ^aCDF_{index} (Red).

assessment of licensee performance under the reactor oversight process (ROP). As a result, submitting materially inaccurate PI information is a violation of 10 CFR 50.9.

NRC Enforcement Policy, Section IV.A, Assessing Significance, states in part. "Violations at commercial nuclear power plants that are associated with inspection findings that *cannot* be evaluated through the [ROP's significance determination process (SDP)] (i.e., violations that may impact the NRC's ability for oversight of licensed activities and violations that involve willfulness, including discrimination) are evaluated in accordance with the guidance in Sections IV.A.1 through IV.A.4 and Section IV.B." Sections IV.A.1 through IV.A.4 address actual safety consequences, potential safety consequences, impacting the regulatory process, and willfulness. Section IV.B addresses assigning severity level.

Per NRC Enforcement Policy, Section IV.A.3, Impacting the Regulatory Process, failures to provide complete and accurate information are considered to be violations which impact the regulatory process. As such, they are assessed using the traditional enforcement process rather than the ROP's SDP. Section IV.A.3 also states that the NRC considers the safety implications of noncompliances with the potential for impacting the NRC's ability to carry out its statutory mission (i.e., oversee licensee activities) and that these noncompliances may be significant because the noncompliances may challenge the regulatory envelope upon which certain activities are licensed.

The existence of a regulatory process violation does not automatically mean that the issue is safety significant. In determining the safety significance of a violation, the NRC will consider appropriate factors for the particular regulatory process violation. These factors include the significance of the underlying issue, whether the failure actually impeded or influenced regulatory action, the level of the individuals involved in the failure, the reasonableness of the failure given the position and training of the individuals involved, and whether the failure invalidates the licensing basis. (Refer to Enforcement Policy Sections IV.A.3 and IV.B.)

Factors to consider for significance determination specific to failures to provide complete and accurate information are addressed in Section IX of the Enforcement Policy. Supplement VII, Miscellaneous Matters, also provides examples of violations categorized at each severity level as guidance in determining the appropriate severity level for these types of violations. Additionally, Section VII.B, Mitigating Enforcement Sanctions, allows the exercise of enforcement discretion to refrain from issuing a civil penalty and/or Notice of Violation after considering the general principles of the Enforcement Policy and the general circumstances.

Some violations of 10 CFR 50.9 are of such low significance that they do not warrant enforcement action. Specifically, if inaccurate PI information provided by a licensee would not have caused a PI color change and, therefore, would not change the NRC actions in response to the information, the violation is not considered significant. The violation would be categorized as a minor violation, would not be subject to enforcement action, and would not be documented in the inspection report. However, inaccurate PI information provided by a licensee that would cause a PI color change, such as from Green to White, is considered significant and warrants enforcement action since it may result in a change in the NRC response, such as increased inspection or other regulatory activity.

Some inaccuracies in the submission of MSPI data are expected because of the time constraints in gathering and submitting historical data, because licensees need time to familiarize and adjust to the new reporting guidance, and because of the large volume of data (12 quarters of data) needed to calculate and verify MSPI. The intent of the RIS was to make the inaccuracies of quarterly MSPI data submitted through the quarter ending April 1, 2007, subject to a 1-year discretionary period. Therefore, if significant inaccuracies in MSPI data submitted through the quarter ending April 1, 2007,³ are identified, then enforcement discretion in accordance with Enforcement Policy, Section VII.B.6, Violations Involving Special Circumstances, is appropriate. Enforcement discretion for materially inaccurate MSPI data submissions subsequent to this period would be appropriate on a case-by-case basis only if the criteria of the Enforcement Policy apply.

Exercise of this discretion requires the approval of the Director, Office of Enforcement (OE), with consultation of the applicable Deputy Executive Director for Operations (as warranted), and where appropriate based on the uniqueness or significance of the issue, OE will provide the Commission prior notice through issuance of a 5-day Enforcement Notification (EN). OE will determine whether it is appropriate to issue an EN. However, it is unlikely that an EN would be necessary for materially inaccurate MSPI data submissions. Enforcement Policy Supplement VII discusses severity levels for violations involving the submission of inaccurate or incomplete PI data. Errors which cause PI to change from Green to White are categorized as Severity Level IV violations and should result in OE being consulted by telephone. Errors which cause the PI to change from Green to either Yellow or Red, from White to either Yellow or Red, or from Yellow to Red, are Severity Level III violations and should be discussed at a weekly enforcement panel. In order for OE to track the extent of use, each case where discretion is used also requires assignment of an enforcement action (EA) number. The EA number is assigned by OE and should be documented in the letter to the licensee above the licensee's name and address. The subject line of the letter to the licensee should also either read or include the phrase, "EXERCISE OF ENFORCEMENT DISCRETION." In addition, the cover letter to the licensee should include reference to Section VII.B.6 of the Enforcement Policy, the severity level of the violation(s), and a clear basis for the discretion. While it is not necessary to include a detailed analysis of this process in the transmittal letter to a licensee, it is imperative that a sound rationale for exercising these discretion provisions be included in the letter to the licensee, lest the agency appear arbitrary and capricious in exercising its enforcement authority.

When exercising enforcement discretion in accordance with this EGM, the following language should be included in the cover letter to the licensee:

Based on the results of this inspection, materially inaccurate and incomplete information was identified in the mitigating systems performance indicator (MSPI) data submitted to the NRC on (date(s)). (Include a brief description of the inaccurate and incomplete information, how it was identified, any applicable corrective actions, and any effect (i.e., change in color) the inaccurate and incomplete information had on the assessment process.) As such, the NRC has determined that (quantity) Severity Level ____ violation(s) of 10 CFR 50.9, Completeness and Accuracy of Information, occurred. This(These) violation(s) was(were) evaluated in accordance with the Enforcement

³ The 1-year discretionary period also includes the 21-day time frame allowed for licensees to submit the April 1, 2007, quarterly data.

Policy, which is included on the NRC's Web site at www.nrc.gov; select **What We Do, Enforcement**, then **Enforcement Policy**. However, after consultation with the Director, Office of Enforcement, (and the Deputy Executive Director for (applicable DEDO if warranted by OE Director)), I have been authorized to exercise enforcement discretion pursuant to Section VII.B.6, Violations Involving Special Circumstances, of the Enforcement Policy to refrain from issuing a Notice of Violation. Discretion is warranted in this case (1) because submission of the incomplete and inaccurate MSPI information was not willful; (2) because the incomplete and inaccurate MSPI information was identified within a period of 1 year after the beginning of MSPI data collection, or by April 1, 2007; and (3) in recognition of (a) ongoing PI development activities, (b) the time constraints to gather and submit historical data, (c) the large volume of data (12 quarters of data) needed to calculate and verify the MSPIs, and (d) the time needed for licensees to familiarize and adjust to the new reporting guidance.

When exercising enforcement discretion in accordance with this EGM, the following language should be included in the text of the report discussing the inspection finding:

Based on the results of this inspection, materially inaccurate and incomplete information was identified in the mitigating systems performance indicator (MSPI) data submitted to the NRC on (date(s)). (Include a brief description of the inaccurate and incomplete information, how it was identified, any applicable corrective actions, and any effect (i.e., change in color) the inaccurate and incomplete information had on the assessment process.) As such, the NRC has determined that (quantity) Severity Level ____ violation(s) of 10 CFR 50.9, Completeness and Accuracy of Information, occurred. However, submission of the incomplete and inaccurate MSPI information was not willful, and the incomplete and inaccurate MSPI information was identified within a period of 1 year after the beginning of MSPI data collection, or by April 1, 2007. Therefore, in recognition of this, the ongoing PI development activities, the time constraints to gather and submit historical data, the large volume of data (12 quarters of data) needed to calculate and verify the MSPIs, and the time needed for licensees to familiarize and adjust to the new reporting guidance; the NRC is exercising enforcement discretion pursuant to Section VII.B.6, Violations Involving Special Circumstances, of the Enforcement Policy to refrain from issuing a Notice of Violation in this case.

The Regional Administrator should normally sign the letter transmitting the exercise of discretion if it includes an issue that could have been considered as escalated action (Severity Level I, II, or III) had it not been for the exercise of discretion. However, the Deputy Regional Administrator or a Division Director may sign the letter provided it includes a statement that the Regional Administrator has been consulted.

The NRC processing of this enforcement discretion is consistent with the existing enforcement discretion guidance in EGM-99-006, Revision 1, Extension of the Guidance for Implementation of the Interim Enforcement Policy for Use During the Reactor Oversight Pilot Program, (ML003710097) dated December 20, 1999. This enforcement guidance (as well as any other pending guidance) can also be located on the NRC's Web site at www.nrc.gov; select **What We Do, Enforcement, Enforcement Guidance, Enforcement Manual**, then scroll down to **Appendix A: Temporary Enforcement Guidance**.

This EGM will be in effect until further notice.

Please contact Leigh Trocine at 301-415-2319 or lxt@nrc.gov if you have any questions.

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