

August 31, 2011

EGM-11-001

MEMORANDUM TO: William M. Dean, Regional Administrator, Region I
Victor M. McCree, Regional Administrator, Region II
Mark A. Satorius, Regional Administrator, Region III
Elmo E. Collins, Regional Administrator, Region IV
Eric J. Leeds, Director, Office of Nuclear Reactor Regulation
Michael R. Johnson, Director, Office of New Reactors
Cynthia A. Carpenter, Acting Director, Office of Federal and State
Materials and Environmental Management Programs
Catherine Haney, Director, Office of Nuclear Material Safety and
Safeguards
James T. Wiggins, Director, Office of Nuclear Security and Incident
Response
Cheryl L. McCrary, Director, Office of Investigations

FROM: Roy P. Zimmerman, Director **/RA/**
Office of Enforcement

SUBJECT: ENFORCEMENT GUIDANCE MEMORANDUM—PILOT PROGRAM
FOR MODIFIED ENFORCEMENT PANEL PROCESS

PURPOSE:

The purpose of this enforcement guidance memorandum (EGM) is to provide guidance for implementing a modified enforcement panel pilot program for enforcement cases that meet certain criteria and to improve efficiency, timeliness, and effectiveness. The modified enforcement panel process applies to factually simple cases for which the application of the Enforcement Policy is relatively straightforward and the resulting enforcement action is fairly easy to determine. This EGM should not be used for complicated enforcement or technical issues where the staff expects considerable dialogue before reaching alignment.

BACKGROUND:

Internal stakeholders have identified that increasing resource challenges are impacting the NRC staff's ability to conduct the current enforcement panel process. To address those resource concerns, this EGM implements a pilot program that uses a modified enforcement panel comprised of a few individuals from select offices in lieu of the full complement of individuals necessary for a normal enforcement panel.

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DISCUSSION:

The enforcement panel process is designed to carefully consider potentially significant enforcement cases to ensure that appropriate agency action is taken. By its nature, the enforcement panel process is a resource intensive activity that involves multiple offices, each with specific expertise and interests. Cases that involve investigations by the Office of Investigations (OI) are particularly resource intensive, in part because of the complex nature of determinations of willfulness. However, in some cases, the nature and the circumstances of the violations are factually simple. For factually simple cases, the NRC staff may determine an appropriate enforcement strategy through a straightforward application of the Enforcement Policy. This EGM modifies the normal enforcement panel process by allowing cases with certain characteristics to be processed with a minimum number of staff.

The modified processes addressed by this EGM should not be used to forego any of the fundamental steps in the normal enforcement panel process (i.e., the assessment of a violation; the determination of willfulness, if applicable; and the application of the Enforcement Policy to determine an appropriate resolution).

The two types of enforcement cases described below could warrant the use of the guidance in this EGM.

Type 1: Nonescalated Office of Investigations-Based Cases

Type 1 cases are nonescalated, factually simple, OI-based cases that involve routine enforcement issues (e.g., failures to report an arrest or incomplete or inaccurate information) for which the expected enforcement action is no greater than a Severity Level (SL) IV notice of violation (NOV) or noncited violation (NCV) for the licensee, applicant, or other organization, or is no greater than a deliberate closeout letter to an individual.

In Type 1 cases, the region or responsible program office would initially identify that the facts of the case appear simple and that, through application of the Enforcement Policy, a nonescalated action is appropriate. A staff member from the region, the Office of the General Counsel (OGC), the Office of Enforcement (OE), and the associated program office (program office participation is optional) will review the transcripts, evidence, and OI report and all must agree that no escalated enforcement action is warranted. Technical staff may contribute, as necessary, to help the modified panel members fully understand the technical matters of the case. (All investigative and inspection related materials that are available to a normal panel will be made available to the modified panel members. Modified panel members will be given the normal time to review the materials.) If all the modified panel members agree on the proposed course of action, if OGC supports the violation and OI's willfulness conclusion, and if the outcome meets agencywide consistency and policy standards, then the region or responsible program office can issue the nonescalated action without further headquarters (HQ) involvement.

Type 1 cases do not require the preparation of an enforcement action worksheet (EAW).

Type 2: Severity Level III Noninvestigation-Based Cases with No Civil Penalty or Use of Discretion

Type 2 cases are escalated, factually simple, noninvestigative cases that are expected to result in no greater than an SL III notice of violation with no civil penalty (CP) and no exercise of enforcement discretion.

For Type 2 cases, the region or responsible program office would identify a factually simple case that, through application of the Enforcement Policy, would typically result in an SL III violation. The region or responsible program office must prepare an EAW. A modified panel would be conducted with a staff member from OE, the responsible program office, and the involved region. Additional technical staff members may contribute, as necessary, to help panel members fully understand the technical matters of the case. If the three modified panel members agree that the issuance of an SL III violation with no CP and no use of enforcement discretion is warranted, the normal escalated process would continue (e.g., a choice letter or choice call).

ACTION:

This pilot program has two parts (i.e., Parts I and II below), which correspond to the two types of cases described above. The following actions are generic to this EGM and apply to both Parts I and II:

- All modified panel members must agree that a case meets the criteria described in this EGM. If any modified panel member disagrees with the use of this EGM to disposition a case, then a normal enforcement panel shall be used.
- If any modified panel member disagrees with the recommended enforcement action, then a normal enforcement panel shall be used to disposition the case.
- The region or responsible program office that initiates this modified panel process shall inform (e.g., by e-mail) those staff members who are typically involved in a normal enforcement panel (e.g., all enforcement coordinators), but who are not included in this modified process, of the upcoming modified process and its results.
- Each modified panel member shall brief his or her respective office management on the facts of the case and the planned use of this pilot process to disposition the case and shall obtain his or her management's agreement to use this process.
- Observers (e.g., regional, OE, or program office management) may attend a modified panel meeting for the purpose of evaluating this pilot program. However, observers are not modified panel members and should not engage in the deliberative process.

Part I: Nonescalated Office of Investigations-Based Cases

The following actions apply to OI-based cases for which the region or program office initiating the modified process recommends, through application of the facts of the case to the Enforcement Policy, a SL IV NOV (with or without a response required) or an NCV to the licensee, applicant or other organization or recommends no more than a deliberate closeout letter to an individual:

- The involved region (typically a regional enforcement specialist (ES)), an OE ES, and an OGC attorney are the modified panel members. The responsible program office (typically the enforcement coordinator) may participate as a panel member (i.e., the program office decides whether to participate).
- Any modified panel member may request, as necessary, technical staff assistance in understanding the technical matters of the case. The inclusion of technical staff by any one panel member need not result in the inclusion of technical staff by the other panel members unless they so desire. (Technical staff members are not voting members in the deliberative process).
- All modified panel members must have read the exhibits and understand the case and must agree that the case can be dispositioned without using the normal panel process.
- No EAW is required.
- The region or program office that initiated this modified process shall coordinate with the other modified panel members to determine their views on the recommended disposition of the case.
- If all modified panel members agree that the recommendation is appropriate, is in accordance with the Enforcement Policy, and is consistent with other similar cases, then the region (or responsible program office, if appropriate) can issue the action without further HQ review.
- The OE panel member shall document the modified panel's decision in EATS with a simple statement of the facts that reflects the circumstances of the OI case and the regulatory bases for the action.
- The OE modified panel member shall distribute the EATS entry to the individual participants for concurrence.

Part II: Severity Level III Noninvestigation-Based Cases with No Civil Penalty or Use of Discretion

The following actions apply to cases in which OI did not conduct an investigation and the region recommends, through application of the facts of the case to the Enforcement Policy, that a nonwillful SL III violation with no CP and no use of enforcement discretion is appropriate:

- A modified enforcement panel comprised of a regional representative (typically the assigned regional ES), an OE ES, and a representative from the program office (typically the enforcement coordinator) will meet and discuss the case.
- Any modified panel member may request, as necessary, technical staff assistance in understanding the technical matters of the case. The inclusion of technical staff by any one panel member need not result in the inclusion of technical staff by the other panel members unless they so desire. (Technical staff members are not voting members of the panel).

- The responsible region will typically schedule the modified panel to occur during that region's usual weekly panel time.
- The responsible region or program office shall prepare an EAW recommending the enforcement action and describing the case in sufficient detail to ensure that the modified panel members have enough information to reach an informed decision.
- If the three modified panel members agree with the recommended action, the region can proceed with the escalated process.
- The OE ES on the modified panel shall prepare a strategy form and enter it into EATS and shall distribute the EATS entry to the individual modified panel members for concurrence.
- If a predecisional enforcement conference (PEC) is held, regional management will lead the conference in accordance with the normal PEC process as described in the Enforcement Manual. Regional management and, as a minimum, the original modified panel members should participate in the post-PEC caucus.
- If the licensee provides additional information in lieu of a PEC, the region will follow the normal regional process for addressing additional comments provided by a licensee.
- OE and the appropriate program office should review and concur on the final action, but are not required to review or concur in a choice letter if one is issued.

Because the Reactor Oversight Process handles most operating reactor enforcement, the use of Part II will likely be rare for operating reactors.

This EGM will remain in effect for a period of 18 months and will expire thereafter. OE will develop evaluation criteria and evaluate this pilot program at periodic intervals during the 18-month duration of the EGM (e.g., at 6 months, at 12 months, and upon expiration of the EGM at 18 months). If the modified enforcement panel process is subsequently adopted, OE staff will revise the Enforcement Manual accordingly.

This EGM does not involve any Enforcement Policy implications.

During the pilot program, minor alterations to the structure proposed in this EGM may be implemented with the concurrence/approval of the Director, OE.

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