

November 20, 2011

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Elmo E. Collins, Regional Administrator, Region IV
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Catherine Haney, Director, Office of Nuclear Material Safety
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Mark A. Satorius, Director, Office of Federal and State
Materials and Environmental Management Programs
Cheryl L. McCrary, Director, Office of Investigations

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

SUBJECT: ALLEGATION GUIDANCE MEMORANDUM 2011-001, "LATE-FILED
ALLEGATIONS"

The purpose of this allegation guidance memorandum (AGM) is to clarify guidance provided to the U.S. Nuclear Regulatory Commission (NRC) staff responsible for handling allegations that may impact agency decisions late in the decision-making process. Such decisions may include those related to the issuance of a license or certification, Commission approval to load fuel, or other situations related to the initiation of operations. Handbook Section II.P of Management Directive (MD) 8.8, "Management of Allegations," dated November 15, 2010, and the Allegation Manual, dated December 1, 2010, provide current guidance. The updated guidance in this AGM is effective immediately and will remain in effect until otherwise directed. The staff will incorporate this guidance into the Allegation Manual and the next revision of MD 8.8.

BACKGROUND

In March 1985, the Commission issued criteria for addressing late allegations in the form of a policy statement entitled, "Handling of Late Allegations." The purpose of the policy statement was to explain to all stakeholders how the staff would address allegations brought to its attention shortly before the date on which the agency was to make a decision authorizing the issuance of an operating license under Title 10 of the *Code of Federal Regulations* (10 CFR) Part 50, "Domestic Licensing of Production and Utilization Facilities." In part, the policy states the following:

The most fundamental tenet flowing from the NRC's statutory mandate under the Atomic Energy Act is that a license may be issued only if it can be found that there is reasonable assurance that the activity to be authorized presents no undue risk to the health and safety of the public. There can be no abdication of the responsibility to make this determination and if there is a serious question as

to the ability to make such finding, no license may be issued and the time necessary to resolve such question must and will be taken. Therefore, in the context of late allegations, it is necessary that appropriate criteria be applied to enable the decision maker, be it the NRC's staff or the Commission itself, to expeditiously determine the significance, in terms of safe operation of the facility, of any allegations made.

The staff incorporated guidance from the 1985 Commission policy statement into the agency allegation program policy guidance in existence at that time (NRC Manual Chapter NRC-0517) and carried the guidance over into the initial issuance of MD 8.8 in 1996. In 2010, the NRC issued the latest revision of MD 8.8. This revision, among other changes, streamlined the directive handbook to retain primary policy guidance while transferring nonpolicy-related information (e.g., clarifying implementation guidance, situational examples, letter templates) from the MD to a separate Allegation Manual.

Recently, questions arose as to whether the guidance in Handbook Section II.P of MD 8.8, as streamlined, on the handling of late allegations still clearly reflected prior Commission direction about what allegations needed to be resolved before the agency made the decisions in question. Additionally, while acknowledging that certain significant and material "late-filed" allegations must be resolved before the NRC can issue a license or certificate, as described in Handbook Section II.P of MD 8.8, clarification was requested by the staff on the criteria for considering an allegation to be resolved.

GUIDANCE

Provided below is enhanced guidance for the NRC staff responsible for handling "late-filed" allegations. The NRC is making these changes to clarify existing allegation program guidance and practices, and the changes do not revise the Commission's previous policy direction. To explain the terminology used in the modified version of Handbook Section II.P of MD 8.8 cited below, the handbook defines an "action office" as the NRC regional or headquarters office that is responsible for reviewing and taking action to evaluate the allegation. MD 8.8 also uses the term "licensee" broadly in reference to any organization that is an applicant for, or holder of, a license, permit, or certification issued pursuant to NRC regulations.

Changes to Management Directive 8.8

The NRC is modifying Handbook Section II.P of MD 8.8 to read as follows:

P. Handling Allegations That May Impact Licensing, Certification, or Operational Decisions or Allegations That Are Filed Late

1. Ideally, all substantiated allegations concerning a particular licensing, certification, or operational matter will be satisfactorily resolved by the licensee before any license or certificate is issued or operational decision is made. If allegation concerns having a potential significant safety impact are material to the staff's findings for such decisions, these allegation concerns are termed "late-filed" and must be evaluated by the NRC and, if substantiated, resolved by the licensee before the NRC can issue a license or certificate or approve

operation. The NRC's evaluation of less significant allegation concerns will be independent of the issuance of the license or certificate or operational decision.

2. If an allegation concern is material to an issue in a licensing or certification proceeding, the action office will promptly consult with the appropriate licensing or certifying office for assistance in determining appropriate action. If warranted, the action office is responsible for recommending to the licensing or certifying office that it notify the presiding officer or other appropriate entity of the allegation concerns. The licensing or certifying office will consult with OGC when preparing such notifications.

3. For each pending license or certificate or operational decision, each action office will prepare an assessment of the safety significance of allegation concerns for which the NRC's evaluation is not expected to be completed or, if substantiated, not expected to be resolved by the licensee before the NRC issues the license or certificate or makes the operational decision. When possible this assessment will be forwarded to the responsible office not less than 30 working days before the licensee has completed activities necessary to support license or certificate issuance or an operational decision (using the licensee's estimate) and will include a recommendation as to whether any or all of these allegation concerns constitute grounds for delaying issuance of (or otherwise restricting) a license or certificate, or delaying operational approval (or otherwise restricting operation).

The agency has added terminology related to "operational" decisions to account for the need to ensure that the staff also appropriately evaluates late-filed allegations that may impact Commission approval to load fuel in accordance with 10 CFR 52.103(g) or other decisions that initiate operations (e.g., authorization of power reactor restart after being shut down as a result of significant performance or operational concerns). The NRC added the word "substantiated" to the first sentence to clarify that the statement refers to those allegations that an NRC evaluation concludes are valid improprieties or inadequacies associated with NRC-regulated activities. The word "licensee" was substituted for "applicant" because this section refers to both applicants and licensees and the broad definition of "licensee" in MD 8.8 refers to both. References to significance and materiality have been reintroduced after they were moved from the MD to the Manual during the 2010 update, to ensure it is clear which allegation concerns need to be assessed before the pending agency decision. The handling of less significant allegation concerns was clarified to indicate NRC's, rather than the licensee's, role. Furthermore, references to the Atomic Safety and Licensing Board Panel have been changed to "presiding officer or other appropriate entity" to conform to terminology used in 10 CFR Part 2, "Rules of Practice for Domestic Licensing Proceedings and Issuance of Orders," as well as to recognize the potential need to notify other entities, such as the Advisory Committee on Reactor Safeguards. The words "when possible" were added to recognize those situations when new allegations are received within the 30-day window referenced. Finally, the NRC has deleted the last sentence of Handbook Section II.P.3 of MD 8.8 since it is redundant to the general policy guidance provided in the beginning of the section.

Determining the Resolution of a Substantiated Material Allegation

As indicated in Handbook Section II.P.1 of MD 8.8, allegations that are significant and material to the staff's findings for a pending licensing, certification, or operational decision must be evaluated by the NRC and, if substantiated, resolved before the NRC can issue the license or certificate or approve operations. If the NRC determines the incoming allegation to be significant and material, then the staff should expedite efforts to determine whether the allegation itself is true or, if such a determination cannot be made quickly, the likelihood that the allegation is true, considering the knowledge, experience, and reliability of the alleged, the knowledge of the NRC staff members familiar with the matter in question, and the extent of credible information contributing or contrary to the allegation assertion. If the staff determines either that the allegation has been substantiated or that the likelihood the allegation will be substantiated is high, the staff must render a conclusion about the corrective actions planned and taken to resolve the inadequacy or potential inadequacies identified. If the staff determines that the allegation concern, if not fully corrected, would have potential immediate impact on public health and safety, then it should render a conclusion that the corrective actions must be completed and that the pending agency decision will be delayed until the corrective actions are completed. If the allegation is significant and material to the pending agency decision but the completion of corrective actions does not have an immediate impact on public health and safety, the staff must evaluate the proposed corrective actions to determine whether they will appropriately resolve the substantiated allegation concern, whether extent-of-condition has been appropriately considered, and whether the estimated times for completion of the corrective actions are reasonable and commensurate with the safety significance of the concern. If the staff determines the corrective actions proposed or in progress to be acceptable, the staff may conclude that the NRC may issue the license or certificate or that operations may resume without restriction. Otherwise, it may be appropriate to consider attaching a restricting condition to the license or certificate or to impose an operational restriction.

Any questions about this guidance should be directed to David Vito in the NRC Office of Enforcement. Mr. Vito can be reached by telephone at (301) 415-2319 or by e-mail at david.vito@nrc.gov.

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