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HAND DELIVERY

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RE: Comments on Third Year of Implementation of the Reactor Oversight Process (67 Fed. Reg. 70,468, "Solicitation of Public Comments on the Third Year of Implementation of the Reactor Oversight Process" (Nov. 22, 2002))

Pursuant to the *Federal Register* notice dated November 22, 2002, Winston & Strawn submits the following comment for NRC Staff consideration regarding implementation of the Reactor Oversight Process ("ROP").¹ In general, and consistent with the many assessments of the ROP, we agree with the objectives and concepts of the program, including the majority of the program guidance documents. However, because implementation of the ROP is still in its early stages, there inherently will be areas for improvement. Indeed, the NRC has stressed that one of its performance goals is to "[i]mprove the effectiveness, efficiency, and realism of the oversight process by implementing a process of continuous improvement."² Our comments are based on our experience and observations made while assisting clients, primarily with respect to inspection findings.

1 67 Fed. Reg. 70,468, "Solicitation of Public Comments on the Third Year of Implementation of the Reactor Oversight Process" (Nov. 22, 2002).

2 *Id.* at 70,469.

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Michael T. Lesar
December 26, 2002
Page 2

Comment

There is insufficient guidance related to transitions from the escalated oversight columns to the lesser oversight columns on the ROP Action Matrix (i.e., downward or "right-to-left" transitions).

The industry, NRC, and public all possess a vested interest in the safe operation of nuclear power plants. It is in the interests of everyone for all licensed plants to be placed in the Licensee Response Column of the Action Matrix. However, for a variety of reasons, it is possible for a licensed plant to be placed in a column of higher regulatory response and oversight. As the plant performance of a licensee in one of the escalated response columns improves—and the bases for the escalated categorization are addressed—a licensee should in due course return to response columns of lesser oversight.

In the past, the right-to-left transitioning (from escalated response to the normal status) has been handled on a case-by-case basis and has, in our experience, been handled inconsistently within and among Regions. More specifically, when the inputs of a licensee in a higher response column have been addressed and the degraded cornerstone issue resolved so as to allow the licensee to return to lower response columns on the Action Matrix, the Staff has at times chosen to exercise broad and arguably unwarranted discretion in retaining the licensee in the higher response column, despite the fact that the inputs no longer warrant retention in the higher column. While the Staff understandably should be able to exercise some discretion in making this determination, the great discretion it currently employs with respect to right-to-left transitioning does not coincide with the very specific programmatic guidance on left-to-right transitioning in the ROP.

This implementation inconsistency in Staff practice seems rooted in the fact that there is little in the way of guidance pertaining to right-to-left transitioning. We believe that the lack of guidance challenges the NRC's stated performance goals of enhancing "predictability, consistency, and objectivity of the oversight process" and reducing "unnecessary regulatory burden through the consistent application of the process."³

As such, we urge the NRC to formulate and implement specific guidance relating to right-to-left column transitions on the Action Matrix.

Basis

A review of the various ROP documents reveals that the existing guidance for column transitioning is centered on the escalation of NRC response and oversight levels on the

Action Matrix (*i.e.*, left-to-right transitioning).⁴ In contrast, the text is nearly void of any written guidance related to the details of transitioning to a lesser amount of oversight on the Action Matrix (*i.e.*, right-to-left transitioning).

Manual Chapter 0305 appears to contain the greatest degree of guidance on right-to-left transitioning. What guidance exists, however, is terse and insufficient. Indeed, the most significant discussion of the issue is the following brief statement:

Also, for inspection findings, the original performance issue will remain open and will not be removed from consideration in the assessment process until the weaknesses in the evaluation are addressed and corrected. The regional offices must convey the specific weaknesses that the licensee needs to address in order to remove this finding from consideration in the assessment process. The finding will be removed from consideration of future agency actions (per the Action Matrix) when the inadequacies in the licensee's efforts to address the issue have been corrected and four quarters of consideration of the original finding in the assessment program [have] been completed.⁵

Although this brief passage specifies some guidance criteria on transitioning to columns of lesser oversight, it is confusing and lacking in important respects.

- First, the concept of removing the finding "when the inadequacies in the licensee's efforts to address the issue have been corrected" is ambiguous and subjective. This open-ended and broad statement in effect grants the Staff broad discretion and does not facilitate consistent treatment of right-to-left transitioning among the various Regions.
- Second, although this portion of Manual Chapter 0305 specifies a duration of at least four quarters before the Staff will remove a finding, it does not discuss in any further detail how a licensee would be transitioned to a lesser oversight column. For example, were a licensee to correct the performance issue, and had four quarters elapsed, it is unclear how many columns the licensee would be transitioned downward or at what rate.

4 These guidance documents include: (1) NRC Inspection Manual, Manual Chapter 0305, "Operating Reactor Assessment Program" (February 2002); (2) NRC Inspection Manual, Manual Chapter 0350, "Oversight of Operating Reactor Facilities in a Shutdown Condition with Performance Problems" (March 2001); (3) NRC Inspection Manual, Inspection Procedure 95001, "Inspection for One or Two White Inputs in a Strategic Performance Area" (January 2002); (4) NRC Inspection Manual, Inspection Procedure 95002, "Inspection for One Degraded Cornerstone or Any Three White Inputs in a Strategic Performance Area" (January 2002); and (5) NRC Inspection Manual, Inspection Procedure 95003, "Supplemental Inspection for Repetitive Degraded Cornerstones, Multiple Degraded Cornerstones, Multiple Yellow Inputs, or One Red Input" (January 2002).

5 Manual Chapter 0305, *supra* note 4, at 19.

Michael T. Lesar
December 26, 2002
Page 4

In regard to other guidance documents, performance to-date indicates that few licensees are likely to enter the Manual Chapter 0350 category. Therefore, the increased, albeit limited, guidance provided in that document would rarely be applied to the majority of actual degraded performance situations.

With respect to the various pertinent Inspection Procedures (*e.g.*, IP 95002 and IP 95003), these guidance documents also tend to focus on escalated response and the supplemental regulatory response procedures to be implemented when the left-to-right column transitions occur. There does not appear to be any specific guidance on the procedure for terminating or "closing out" the increased inspection procedures once the licensee's inputs indicate that the performance areas have returned to more acceptable performance levels.

Summary and Conclusion

The minimal guidance available for right-to-left transitions is subjective and open-ended, thereby allowing the NRC Staff to exercise broad discretion in determining when a licensee in an escalated response column may be transitioned to lesser response columns. As a result, the discretion has not been consistently applied throughout the NRC Regions. This can result in licensees being confined to inappropriately lengthened high levels of regulatory oversight and response once the performance issue has been corrected. While the Staff understandably should be able to exercise some discretion in making this determination, the large amount of discretion it can employ with respect to right-to-left transitioning does not square with the very specific programmatic guidance on left-to-right transitioning or the goals of objectivity and predictability in the ROP.

Therefore, pursuant to the NRC's goal of improving the ROP program, we urge the NRC to develop useful and clear guidance concerning the procedure by which right-to-left transitions are to take place on the Action Matrix. Similarly, we encourage the revision of the escalated Inspection Procedures to outline the termination criteria and the procedure for doing so.

Thank you for the opportunity to provide comments on the ROP.

Sincerely,



David A. Repka
Carey W. Fleming