

October 17, 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

FROM: Cynthia A. Carpenter, Director/RA/
Office of Enforcement

SUBJECT: ENFORCEMENT GUIDANCE MEMORANDUM – DISPOSITIONING
10 CFR 70.72, *FACILITY CHANGE AND CHANGE PROCESS*
VIOLATIONS RELATED TO NRC REGULATORY ISSUES
SUMMARY 2006-14, FACILITY CHANGES UNDER
10 CFR 70.72(C)(2)

This enforcement guidance memorandum (EGM) provides guidance for the dispositioning of violations involving the failure of licensees to manage certain facility changes as currently required in 10 CFR 70.72(c)(2). The current regulatory language embodies all changes made to items relied on for safety (IROFS) that are listed in a licensee's Integrated Safety Analysis (ISA), without exception.

Several licensees have indicated that they believe that equivalent replacement of the safety function of an IROFS and 10 CFR 70.72(c)(2) are met, as long as the performance requirements of 10 CFR 70.61, *Performance requirements*, are met. NRC does not necessarily agree with that position in its entirety. NRC believes that licensees must ensure equivalent replacement for IROFS needed to meet the performance requirements of 10 CFR 70.61. However, NRC does agree that licensees should be afforded maximum flexibility in making changes to IROFS that are not needed to meet the performance requirements of 10 CFR 70.61. Accordingly, licensees should have the flexibility to remove an IROFS or replace an IROFS not needed to meet the performance requirements of 10 CFR 70.61, without an equivalent replacement, and without the staff's prior approval. In support of this NRC position, the staff is pursuing a rule change pertaining to IROFS.

On September 27, 2006, NRC published a Direct Final Rule in the *Federal Register* (Volume 71, No. 187, page 56344) to modify 10 CFR 70.72(c)(2) to clarify that equivalent replacement of safety function only applies to those IROFS needed to meet the performance

requirements in 10 CFR 70.61. Based on the NRC's recognition of the need to clarify the requirement, licensees' past errors in failing to meet the specific requirements of 10 CFR 72(c)(2), specifically, making changes to IROFS that are not needed to meet the performance requirements of 10 CFR 70.61 without NRC approval, will not be cited as a violation of NRC requirements. In addition, licensee changes to IROFS that are not needed to meet the performance requirements of 10 CFR 70.61 will not be cited as violations while the revised rule is being implemented.

Therefore, where licensees have removed or modified IROFS that appear in their respective ISA summaries that are not required to meet the performance requirements of 10 CFR 70.61, the NRC will exercise discretion. The NRC will exercise discretion under these limited conditions because the NRC has published a direct final rule that will allow licensees to make facility changes without prior NRC approval, only when the IROFS that are changed are not required to meet the performance requirements of 10 CFR 70.61.

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

Based on the results of this inspection, errors were identified in the manner in which you have been maintaining compliance with the provisions of 10 CFR 70.72(c)(2). (Include a brief description of the errors and how they were identified.) As such, the NRC has determined that (quantity) Severity Level III violation(s) of 10 CFR 70.72(c)(2) occurred. This(These) violation(s) was(were) evaluated in accordance with the Enforcement 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 Materials, Research, State and Compliance Programs, if applicable), 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 because the NRC has determined that licensees should be afforded maximum flexibility in making changes to IROFS that are not needed to meet the performance requirements of 10 CFR 70.61, and as such has published a direct final rule to implement that flexibility.

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, errors were identified in the manner in which you have been maintaining compliance with the provisions of 10 CFR 70.72(c)(2). (Include a brief description of the errors and how they were identified.) As such, the NRC has determined that (quantity) Severity Level III violation(s) of 10 CFR 70.72(c)(2) occurred. However, because this (these) error(s) was(were) not willful, and because the NRC has published a direct final rule to implement additional flexibility in making changes to IROFS that are not needed to meet the performance requirements of 10 CFR 70.61, 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 (containing the enforcement action (EA) tracking number) 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.

This EGM will be in effect until further notice.

Please contact Michael Burrell at 301-415-2074 or mrb3@nrc.gov if you have any questions.

cc: L. Reyes, EDO
SECY
M. Virgilio, DEDMRS
W. Kane, DEDR
M. Johnson, OEDO
B. Boger, NRR
M. Federline, NMSS
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C. Miller, FSME
L. Camper, FSME
E. W. Brach, NMSS
J. Giitter, NMSS
G. Tracy, NSIR
D. Dorman, NSIR

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